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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 462

GERMANTOWN TRUST COMPANY, TRUSTEE OF
THE GERMANTOWN TRUST COMPANY BOND
INVESTMENT FUND, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 13, 1939.

CERTIORARI GRANTED NOVEMBER 13, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 462

GERMANTOWN TRUST COMPANY, TRUSTEE OF
THE GERMANTOWN TRUST COMPANY BOND
INVESTMENT FUND, PETITIONER,

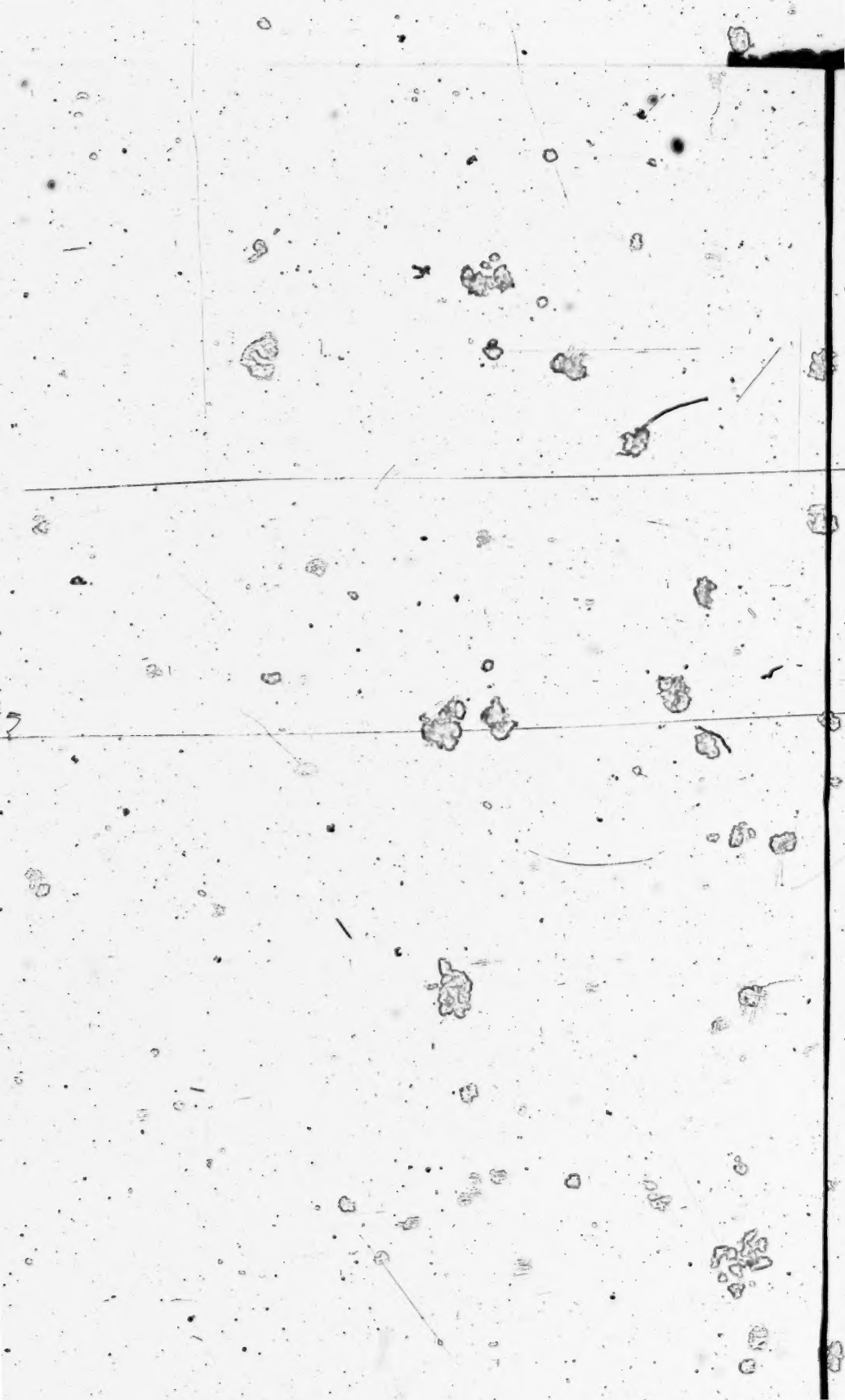
vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT

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Docket Entries

1

**Before the
UNITED STATES BOARD OF TAX APPEALS**

Docket No. 89166

**GERMANTOWN TRUST COMPANY, TRUSTEE
OF THE GERMANTOWN TRUST COMPANY
BOND INVESTMENT FUND,**

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:

**For Taxpayer: Paul F. Myers, Esq., Martin W.
Meyer, Esq., Harold Evans, Esq.**

For Com'r: C. R. Marshall, Esq.

7/27/38 Transferred to Mr. Murdock

DOCKET ENTRIES

1937

May 22—Petition received and filed. Taxpayer notified. (Fee paid).

May 24—Copy of petition served on General Counsel.

Docket Entries

June 19—Answer filed by General Counsel.

June 24—Copy of answer served on taxpayer.

July 26—Reply to answer filed by taxpayer. 7/26/37
copy served on General Counsel.

Nov. 30—Notice issued placing proceeding on
Wash. D. C. Calendar.

1938

Mar. 17—Hearing set 4/28/38.

Apr. 28—Hearing had before Mr. Black on merits.
Submitted. Stipulation of facts filed. Briefs as
per rules. *

May 2—Transcript of hearing of April 28, 1938
filed.

May 27—Brief filed by taxpayer. 5/28/38 copy
served on General Counsel.

June 23—Reply brief filed by General Counsel.

July 12—Reply brief filed by taxpayer. 7/12/38 copy
served on General Counsel.

Aug. 24—Memorandum opinion rendered, John E.
Murdock, Div. 3. Decision will be entered for
the petitioner.

Aug. 26—Decision entered, J. E. Murdock, Div. 3.

Nov. 17—Petition for review by United States Cir-
cuit Court of Appeals, Third Circuit, with as-
signments of error filed by General Counsel.

Dec. 1—Proof of service filed by General Counsel.

Nov. 17—Petition for review by United States Court
of Appeals, District of Columbia, with assign-
ments of error filed by General Counsel.

Docket Entries

3

Dec. 1—Proof of service filed by General Counsel.

Dec. 3—Affidavit of service of petition for Review (Dist. of Columbia) (2) attorney & petitioner.

Dec. 3—Affidavit of service of petition for review filed (Third Circuit) (2) attorney and petitioner.

1939

Jan. 12—Motion for extension of time to 2/15/39 to transmit the record filed by General Counsel. (Dist. of Columbia).

Jan. 12—Motion for extension of time to 2/15/39 to transmit the record filed by General Counsel. (Third Circuit).

Jan. 12—Order enlarging time to 2/15/39 to transmit the record entered. (Dist. of Columbia).

Jan. 12—Order enlarging time to 2/15/39 to transmit the record entered. (Third Circuit).

Jan. 18—Certified copy of order from third circuit re transmission of copies of Exhibits "D" and page 1 of Exhibit "E" as physical exhibits and a copy of third order filed.

Jan. 21—Praecipe of record filed by General Counsel, with proof of service thereon.

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Petition

PETITION

(Filed May 22, 1937)

~~2~~

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:B 3 LS 90 D) dated February 27, 1937, and as a basis of its proceedings alleges as follows:

1. Petitioner is a fiduciary, with its principal office at Germantown and Cheltenham Avenues, Philadelphia, Pennsylvania.

2. The notice of the deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on February 27, 1937.

3. The taxes in question are income taxes for the calendar year 1932 and in the amount of Three Thousand Six Hundred Eighty-Six Dollars (\$3,686), all of which is in controversy.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in determining a deficiency for 1932 income taxes in view of the fact that the period for the assessment of such taxes had already expired.

(b) The Commissioner further erred in holding that the petitioner was operating as a corporation during 1932.

(c) The Commissioner further erred in failing

to hold that the petitioner was operating as a trust during 1932.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner filed a fiduciary return for the year 1932, on or before March 15, 1933, and the said return has been duly audited and approved by the Bureau of Internal Revenue.

(b) The Commissioner did not determine any deficiency in respect of such tax until February 27, 1937, at which time the statutory period for the assessment of income taxes had expired.

(c) The taxpayer believes that the individual beneficiaries of the said trust fund have regularly included in their individual income tax returns their share of the income of the said fund and have duly paid income taxes thereon.

(d) The Germantown Trust Company Bond Investment Fund was formed by agreement dated April 1, 1930, by and among Germantown Trust Company as trustee, and beneficiaries of the said fund, designated therein as participants, acting by and through Germantown Trust Company as agent. A copy of said agreement, marked Exhibit "B", is attached hereto and made a part hereof.

(e) The Germantown Trust Company Bond Investment Fund was created to form a single fund of high-grade bonds in which persons for whom the Company held securities as agent might have undivided interests. The trustee was to make and did make substantial permanent conservative investments.

(f) Changes in investments in bonds held in the

said fund have been made only for the purpose of conservation of the corpus of the fund and liquidation thereof upon withdrawal of units from the fund. The trustee has never been active in buying and selling bonds and has engaged in no other activities except the making of substantial permanent conservative investments and the collection and disbursement of the income received therefrom.

(g) The management of the said fund was solely in the hands of the trustee. The participants in the fund had no voice in its creation or in its management. The interests of the participants were not transferable. The participants could terminate their interests in the fund upon due notice, and the trustee upon giving the notice provided in the agreement could likewise terminate the trust. The powers and duties of the trustee, as well as the manner of operation of the fund, were the same as those usually existing in fiduciary relationships with the exception that the agreement permitted the commingling of the funds received in trusts from the participants.

Wherefore, the petitioner prays that this Board may hear the proceeding and find that the period for the assessment of 1932 income taxes had already expired on February 27, 1937, and that the petitioner was operating as a trust during 1932, rather than as a corporation.

GERMANTOWN TRUST COMPANY
BOND INVESTMENT FUND

By GERMANTOWN TRUST COMPANY, TRUSTEE

By THOS. HUMPHREYS, JR.

Germantown and Cheltenham

Petition

7

Avenues, Philadelphia,
Pennsylvania.

Paul F. Myers,
Martin W. Meyer,
Munsey Bldg., Washington, D. C.
Harold Evans,
Provident Trust Bldg., Phila., Penna.,
Counsel for Petitioner.

State of Pennsylvania,
County of Philadelphia, ss:

Thos. Humphreys, Jr., being duly sworn, says that he is Assistant Trust Officer of the petitioner above named and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated as to be upon information and belief, and those facts he believes to be true.

THOS. HUMPHREYS, JR.

Subscribed to and sworn to before me this 15th day of May, 1937.

Nellie Groves,

My commission expires April 14, 1939.

I am not a Director, Stockholder or Officer in the above named corporation.

*Petition
Exhibit "A"*

EXHIBIT "A"

TREASURY DEPARTMENT
Washington
Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to
Germantown Trust Company Bond Investment
Fund,
Germantown Trust Company, Trustee,
Cheltenham and Germantown Avenues,
Philadelphia, Pennsylvania.

Feb. 27, '37.

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) 1932 discloses a deficiency of \$ 3,686.00 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Wash:

*Petition
Exhibit "A"*

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ington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING.

Commissioner.

By (Signed) W. T. SHERWOOD
Acting Deputy Commissioner.

Enclosures: . . .
Statement
Form 870

STATEMENT

IT:B:3

LJ-90D

In re: Germantown Trust Company Bond
Investment Fund,
Germantown Trust Company, Trustee,
Cheltenham and Germantown Avenues,
Philadelphia, Pennsylvania.
Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1932	\$3,686.00	None	\$3,686.00

The deficiency indicated above is shown in the agent's report dated July 8, 1936, a copy of which was furnished you under date of July 21, 1936, by

Petition
Exhibit "A"

the internal revenue agent in charge at Philadelphia, Pennsylvania.

Reference is made to your brief dated August 8, 1936, filed in the office of the internal revenue agent in charge, in protest against the findings of the examining officer.

Careful consideration has been given your protest, together with the Trust Agreement made on April 1, 1930, in connection with the review of the report of the internal revenue agent in charge.

It is held by this office that during the year 1932 you were operating as a corporation as defined by section 1111(2) and article 1312, Regulations 77, Revenue Act of 1932.

A response has not been received to the preliminary letter addressed to you under date of February 6, 1937.

Computation of Net Income

Net income reported on form 1041 \$26,570.58

Germantown Trust Company Bond
Investment Fund.

Statement.

Brought forward \$26,570.58

Unallowable deductions and additional
income:

(1) Interest accrued on bonds
purchased during taxable
year \$246.72

Less:

Error in computation 10.00 236.72

Net income adjusted \$26,807.30

Computation of Tax

Net income taxable at 13-3/4% \$26,807.30

Income tax liability \$ 3,686.00

Petition
Exhibit "A"

11

Income tax previously
assessed

None

Deficiency in income tax

\$ 3,686.00

Explanations

(1) The amount, representing the accrued interest, which you advanced to the seller of municipal bonds purchased during the taxable year, is not a proper deduction from income.

ANSWER

(Filed June 19, 1937)

Now comes the respondent, by his attorney Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the taxes in controversy are income taxes for the calendar year 1932. Denies the remainder of the allegations contained in paragraph 3 of the petition.

4 (a), (b), (c). Denies the Commissioner erred in respect to the matters in sub-paragraphs (a), (b) and (c) of paragraph 4 of the petition.

5 (a). Admits a so-called "Fiduciary Return of Income" for the calendar year 1932 (Form 1041) was filed in the name of The Germantown Trust Company Bond Investment Fund. Denies the remainder of the allegations contained in sub-paragraph (a) of paragraph 5 of the petition.

(b), (c), (d), (e), (f), (g). Denies the allegations contained in sub-paragraphs (b) to (g), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and

every allegation contained in taxpayer's petition, not hereinbefore admitted, qualified or denied.

7. Respondent alleges:

(a) That the petitioner is taxable for the year 1932 as a corporation.

(b) That the petitioner filed no corporation income tax return for the calendar year 1932 on Form 1120.

(c) That if a corporation makes no return of the tax imposed by Title I of the Revenue Act of 1932, but each of the shareholders includes in his return alleged distributive shares of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed. (Section 275 (c) of Revenue Act of 1932; ch. 209, 47 Stat. 169, 237).

(d) That the notice of deficiency dated February 27, 1937, was mailed to the petitioner herein within four years after the last date on which the shareholder's returns were filed and prior to the expiration date of the statute of limitations for making assessments against said petitioner.

Wherefore it is prayed that this appeal be denied.

(Signed) MORRISON SHAFBOTH,

*Chief Counsel,
Bureau of Internal Revenue*

Of Counsel:

J. E. Marshall,

C. B. Marshall,

Special Attorneys,

Bureau of Internal Revenue.

PETITIONER'S REPLY**(Filed July 26, 1937)**

Now comes the petitioner and for reply to the respondent's answer alleges as follows:

7 (a) Denies that the petitioner is taxable for the year 1932 as a corporation.

(b) Denies that the petitioner filed no income tax return for the calendar year 1932 and on the contrary avers that the petitioner filed a fiduciary return on or before March 15, 1933, as set forth in paragraph 5. (a) of its petition.

(c) Admits that paragraph 7 (c) correctly sets forth the substance of Section 275 (c) of the Revenue Act of 1932, but denies that the said section is applicable in view of the fact that a return was filed by the petitioner as above set forth.

(d) Admits that the notice of deficiency dated February 27, 1937 was mailed within four years after the last date on which any return of a beneficiary of the trust was filed, but avers that such notice was not mailed within two years after the return was filed by the petitioner as required by Section 275 (a) of the Revenue Act of 1932.

Wherefore it is prayed that the petition be granted.

GERMANTOWN TRUST COMPANY
BOND INVESTMENT FUND
By GERMANTOWN TRUST COM-
PANY, TRUSTEE

Petitioner's Reply

15

By (S) THOMAS HUMPHREYS,
JR.,

Assistant Trust Officer.
Germantown & Cheltenham Aves.,
Philadelphia, Pa.

Paul F. Myers,
Martin W. Meyer,
Munsey Bldg., Wash., D. C.

Harold Evans,
Provident Trust Bldg., Phila., Penna.,
Counsel for Petitioner.

MEMORANDUM OPINION

(Entered Aug. 24, 1938)

Paul F. Myers, Esq., for the petitioner.
C. R. Marshall, Esq., for the respondent.

Murdock:

The Commissioner determined a deficiency of \$3,686 in income tax for 1932 on the theory that the petitioner is an association taxable as a corporation. The petitioner raises two issues:

- (1) It is an association taxable as a corporation;
- (2) Has the statute of limitations run against assessment and collection of the deficiency.

The facts have been stipulated and are found as stipulated. A decision favorable to the petitioner upon either issue will completely dispose of the case, and for that reason the first issue will not be discussed or decided.

The petitioner filed a "fiduciary Return of Income" for 1932 on March 15, 1933. The return was made on form 1041. The petitioner never filed a return on form 1120 for 1932. The notice of deficiency was mailed on February 27, 1937, which was more than two years after the filing of the return on form 1041 but was less than four years after the last date upon which any participant filed his 1932 income tax return. The fiduciary return was filed in good faith and gave all of the information necessary for the assessment of the tax upon a corporation.

The Commissioner used that information to prepare a return on form 1120 on September 17, 1936. He called this a "substitute return" and it bears a notation that the reason for preparing it was "Orig. filed on 1041".

The respondent concedes that the statute has run against assessment of the tax if the two-year period was started by the fiduciary return on form 1041. He contends, however, that this is a no-return case governed by section 275(c) of the Revenue Act of 1932 rather than by section 275(a). The Commissioner further concedes that the Board under similar facts held in the case of *Roosevelt & Son Investment Fund, et al.*, 34 B. T. A. 38, that a return on form 1041 started the running of the statutory period of two years provided in section 275(a) of the Revenue Act of 1928. He does not suggest that the present case is different in any important circumstance from the *Roosevelt* case. But he argues that the Circuit Court of Appeals for the Second Circuit, in dismissing his appeal in that case for lack of jurisdiction, (89 Fed. (2d) 706), indicated that the return on 1041 did not start the two-year period and only a return on 1120 would suffice. He says that the dissenting opinion of the Board in the *Roosevelt* case sets forth his contentions.

The Board in the *Roosevelt* case stated its reasons for concluding that a fiduciary return would suffice. Following its opinion in the *Roosevelt* case, the Board holds that the statute had run before the Commissioner mailed his notice in this proceeding.

Decision will be entered for the petitioner.

Entered Aug. 24, 1938.

(Seal)

DECISION

(Entered Aug. 26, 1938)

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion entered August 24, 1938, it is

Ordered and decided: That there is no deficiency in income tax for the year 1932.

Entered Aug. 26, 1938.

(Signed) J. E. MURDOCK,
Member.

(Seal)

**PETITION FOR REVIEW AND ASSIGNMENTS
OF ERROR**

(Filed Nov. 17, 1938)

*To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Third Circuit:*

Now comes Guy T. Heilvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that the respondent on review (hereinafter referred to as the taxpayer) was, during the taxable year 1932, an association taxable as a corporation. The principal place of business of the taxpayer is situated at Germantown and Cheltenham Avenues, Philadelphia, Pennsylvania. The taxpayer filed a fiduciary information return on Form 1041 for the calendar year 1932, with the Collector of Internal Revenue for the First District of Pennsylvania, whose office is located within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit.

II.

The nature of the controversy is as follows, to wit:

*Petition for Review and
Assignments of Error*

The taxpayer is an association engaged in investments in securities for the benefit of its members or participants. The taxpayer on March 15, 1933, reported its taxable income for the calendar year 1932, on a fiduciary information return, Form 1041, disclosing a net taxable income of \$26,570.58. The taxpayer did not file a corporation income tax return on Form 1120. The several members of the taxpayer association included their distributive shares of the net income of the association in their respective income tax returns for the year 1932. The last date any participant filed his income tax return for said year was March 15, 1933.

Under date of February 27, 1937, the Commissioner, having determined that the taxpayer was taxable as a corporation, mailed a notice of deficiency to the taxpayer asserting a deficiency in income tax in the amount of \$3,686.00. The deficiency notice aforesaid was mailed to the taxpayer more than two years after the taxpayer filed its fiduciary return, Form 1041, but less than four years after the date on which a member or participant filed his income tax return for the year 1932.

Under date of May 22, 1937 the taxpayer filed a petition with the United States Board of Tax Appeals for redetermination of the deficiency asserted by the Commissioner as aforesaid. After the answer of the Commissioner was duly filed, the case was submitted to the Board for decision upon the pleadings and stipulations of fact. The memorandum opinion of the Board of Tax Appeals was rendered under date of August 24, 1938, and the final order of the Board was entered August 26, 1938, in which it was ordered and decided that there was no defi-

ciency in income taxes for the year 1932. In re-determining the deficiency the Board of Tax Appeals held and decided that the assessment and collection of the tax was barred by the statute of limitations in such case made and provided.

III.

The Commissioner of Internal Revenue being aggrieved by the conclusions of law contained in the decision of the Board of Tax Appeals and by its order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Third Circuit. The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the tolling of the statute of limitations under Section 275(a) of the Revenue Act of 1928, began upon the filing of the fiduciary information return on Form 1041, on March 15, 1933.

2. The Board of Tax Appeals erred in not holding and deciding that the filing of the fiduciary information return on Form 1041 did not start the running of the statute of limitations under Section 275 (a) of the Revenue Act of 1928.

3. The Board of Tax Appeals erred in holding and deciding that a return, such as contemplated by the statute, was filed.

4. The Board of Tax Appeals erred in not holding that no return, such as contemplated by the statute, was filed.

5. The Board of Tax Appeals erred in holding and deciding that an information return was a return for the purpose of the tax within the meaning of Section 275(c) of the Revenue Act of 1928.

*Petition for Review and
Assignments of Error*

6. The Board of Tax Appeals erred in not holding and deciding that an information return is not a return for the purpose of the tax within the meaning of Section 275(c) of the Revenue Act of 1928.

7. The Board of Tax Appeals erred in entering its final order of redetermination that there is no deficiency in the tax.

8. The Board of Tax Appeals erred in failing to enter a final order of redetermination that there is a deficiency in the tax in the amount of \$3,686.00, as determined by the Commissioner.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Third Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd) J. P. WENCHEL,

W

*Chief Counsel, Bureau of
Internal Revenue.*

(Sgd) JAS. W. MORRIS,

*Assistant Attorney General.
Of Counsel:*

Ralph F. Staubly,

*Special Attorney,
Bureau of Internal Revenue.*

*Petition for Review and
Assignments of Error*

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*United States of America,
District of Columbia, ss:*

Ralph F. Staubly, being duly sworn, says that he is a Special Attorney, Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief; and as to those matters he believes it to be true.

(Sgd) RALPH F. STAUBLY.

*Special Attorney, Bureau of
Internal Revenue.*

Sworn and subscribed to before me this 16th day of November, 1938.

(Sgd) Geo. W. Kries.
Notary Public.

My commission expires Nov. 15, 1942.

RFS spt 11-16-38

*Notice of Filing Petition
for Review*

NOTICE OF FILING PETITION FOR REVIEW

(Filed Dec. 1, 1938).

To:

Paul F. Myers, Esq.,
Martin W. Meyer, Esq.,
Williams, Myers, and Quiggle,
Munsey Building, Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 17th day of Nov., 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of November, 1938.

(Signed) J. P. WENCHEL,

RLW

*Chief Counsel,
Bureau of Internal Revenue.*

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 18 day of November, 1938.

PAUL F. MYERS,
MARTIN W. MEYER.

*Attorneys for Respondent
on Review.*

RFS-spt 11-16-38

*Notice of Filing Petition
for Review*

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NOTICE OF FILING PETITION FOR REVIEW
(Filed Dec. 3, 1938)

To:

Germantown Trust Company, Trustee of the
Germantown Trust Company Bond Investment
Fund,

Germantown and Chelton Avenues,
Philadelphia, Pennsylvania.

You are hereby notified that the Commissioner of Internal Revenue did, on the 17th day of November, 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of November, 1938.

(Signed) J. P. WENCHEL

RLW

*Chief Counsel, Bureau of
Internal Revenue.*

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this day of
1938.

Respondent on Review.

RFS-spt 11-16-38

*Affidavit of Service***AFFIDAVIT OF SERVICE**

(Filed Dec. 3, 1938)

*Commonwealth of Pennsylvania,**City and County of Philadelphia, ss:*

I, Leo P. Cooney, a duly authorized Internal Revenue Agent, being duly sworn according to law, depose and say that on November 21, 1938, I served the annexed Notice of Filing Petition for Review and copy of Petition for Review in the above-entitled case upon Mr. Thomas Humphreys, Jr., Assistant Trust Officer of Germantown Trust Company, Cheltenham and Germantown Avenues, Philadelphia, Pennsylvania, by handing to him a copy of Notice of Filing Petition and copy of Petition for Review, at the same time exhibiting to him the original Notice of Filing Petition.

(Sgd.) LEO P. COONEY,
Internal Revenue Agent.

Sworn to and subscribed before me this 21st day of November, 1938.

(Sgd.) ALBERT A. ROTHAM,
Internal Revenue Agent.

*Notice of Filing Petition
for Review*

27

**NOTICE OF FILING PETITION FOR
REVIEW**

(Filed Dec. 3, 1938)

To:

Harold Evans, Esq.,
Provident Trust Building,
Philadelphia, Pennsylvania.

You are hereby notified that the Commissioner of Internal Revenue did, on the 17th day of November, 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of November, 1938.

(Signed) J. P. WENCHEL,

RLW

*Chief Counsel,
Bureau of Internal Revenue.*

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this day of
1938.

*Attorney for Respondent on
Review.*

*Affidavit of Service***AFFIDAVIT OF SERVICE**

(Filed Dec. 3, 1938)

*Commonwealth of Pennsylvania.**City and County of Philadelphia ss:*

I, Leo P. Cooney, a duly authorized Internal Revenue Agent, being first duly sworn according to law, depose and say that on November 19, 1938, I served the annexed Notice of Filing Petition for Review and copy of Petition for Review in the above entitled case upon Harold Evans, Esq., Attorney for Petitioner, at the Provident Trust Building, 17th and Chestnut Streets, Philadelphia, Pennsylvania, by handing to him copy of Notice of Filing Petition and copy of Petition for Review, at the same time exhibiting to him the original Notice of Filing Petition.

(Sgd.) LEO P. COONEY,
Internal Revenue Agent.

Sworn and subscribed to before me this 21st day of November, 1938.

(Sgd.) ALBERT A. ROTHMAN,
Internal Revenue Agent.

STIPULATION OF FACTS

(Filed April 28, 1938)

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that for the purposes of the above-entitled proceeding, the Board may accept as true the following facts and include them in its Findings of Fact. It is further agreed that neither party hereto shall be precluded from introducing at the hearing in this matter any further facts not inconsistent with those herein agreed to.

1. The Germantown Trust Company (hereinafter referred to as the "Company"), is a trust company organized and existing under the laws of the State of Pennsylvania. Its principal office is at Germantown and Cheltenham Avenues, Philadelphia, Pennsylvania.

2. Pursuant to an authorization contained in its corporate charter and the provisions of the laws of the State of Pennsylvania, the "Company" conducts a large trust business involving the handling of all forms of trust estates, and also acts as agent for various individuals and corporations in the custody, handling, and management of their investments.

In order to afford persons of small means the advantage available to others and the advantage of investing funds in diversified high grade bonds without delay and undue expense and under conditions which would permit of ready liquidation of the in-

vestment, the "Company" by agreement dated April 1, 1930, formed the so-called "Germantown Trust Company Bond Investment Fund" (hereinafter referred to as the "Fund"), a copy of which "agreement"—designated the "Germantown Trust Company Bond Investment Fund Agreement"—is attached hereto as Exhibit "A" and made a part hereof.

3. The "Company" was named and designated as "trustee" under the aforesaid agreement (Exhibit "A") and has since April 1, 1930, and at all times material to this proceeding, been acting as "trustee" under the provisions of said agreement. The "Company" acting as "trustee" under the said agreement is hereinafter referred to as the "petitioner". (Whenever the words "agent", "trust", "trustee" and "trust agreement" are used herein, they are used merely for the purpose of description and not as a technical conclusion of law of the status of the entity involved under the Revenue Act of 1932: such conclusion being for the Board of Tax Appeals to determine in the instant case.)

4. The purpose of the "agreement" was to form a single fund of high grade bonds to be known as the "Germantown Trust Company Bond Investment Fund" in which persons for whom the petitioner shall hold securities as agent shall have undivided interest. In accordance with the purpose of the agreement, and in accordance with its provisions, investments were confined to corporate bonds and bonds issued by a nation or by a political subdivision thereof, except in the case of reorganization and under conversion privileges as provided in Article 2 of the said agreement (Exhibit "A").

Only persons for whom the "Company" held securities as "agent" or "trustee" could and did participate in said fund.

5. Such person desiring to participate under the provision of the aforesaid agreement (Exhibit "A") signed an assent or authorization substantially as set forth in Article 6 of the agreement (Exhibit "A"), which person thereafter was called a "participant". The participants deposited with the petitioner under the agreement cash funds to be invested and reinvested; and a certificate of participation was issued by the petitioner to the participant evidencing the undivided interest of the participant in the fund. The said certificates were not transferable. The certificates issued remained in the custody of the "Company" as part of the securities of such participant's account. When a participant withdrew all or part of his share of the fund, the petitioner cancelled the old certificate and issued a new one for the remaining share or shares, if there was any share not withdrawn.

6. The rights, powers, duties and obligations of the various parties to the said agreement (Exhibit "A") in the aforesaid "Fund" are fixed and determined by the provisions of the said agreement and said fund has at all times since its formation been operated in accordance with and pursuant to the terms of the said agreement (Exhibit "A"). The petitioner operated the fund in accordance with the powers and duties provided in the said agreement. The Company in the exercise of its powers and duties as trustee held the legal title to all the securities, cash and other assets of the Fund; it kept all the securities, cash and other assets of the Fund

separate from all other securities, cash and assets of the Company; it kept accounts of all transactions on account of the Fund; at the request of any participant at any time it gave to such participant full information about the Fund and about the securities in which the Fund was to be invested; it furnished each participant an annual statement of the condition of the Fund and a statement as to each participant's share in the income, profits or losses from sales or exchanges of the principal; it was authorized to pay such taxes as it shall be required to pay because of its trusteeship; it was authorized at any time, in its sole discretion, to terminate the trust in whole or in part by disposing of all or part of the assets of the Fund and by distributing the proceeds thereof pro rata among the participants. It also might at any time, on giving ten days' written notice to a participant, cancel all of his shares, by paying him the value of such shares fixed as provided by the agreement (Exhibit "A") with respect to the withdrawal of shares; and it was to be liable only for the exercise of the ordinary care and diligence required of a trustee.

7. The manner in which cash funds were deposited with the Company as trustee in the fund; the manner in which original and new shares were issued against the fund; the manner in which investments were to be made of the funds; the manner in which certificates were to be issued, held, withdrawn, cancelled, reissued and redeemed; the manner in which participants were to assent to investment of cash and proceeds in securities by the petitioner; the manner in which the income of the fund was to be collected, calculated and distributed; and the manner in which the agreement was to be

amended; were set forth under the provisions of the "agreement" (Exhibit "A"); they were all carried out in accordance with and pursuant to its terms and provisions.

8. The purpose of the agreement was to make substantially permanent conservative investments. The said purpose was carried out as far as possible and changes in investment were necessary from time to time to keep the funds so invested. Securities were sometimes sold within a short time after their purchase where, in the discretion of the Committee, it was considered advisable. The company's trust committee managed the "fund" as provided in the agreement, which was in the same way as various other "trusts" for which it acted as trustee were managed.

9. All profits derived from the sale or exchange of securities were to be considered as principal and remain in the Fund, except as provided in the "agreement". Shares of the Fund could be and were withdrawn in accordance with the manner provided in Article 5 of the aforesaid agreement (Exhibit "A").

10. During the year 1932 there was great uncertainty with respect to the financial condition of all corporations and political subdivisions in the United States. Market values were declining, the business outlook was pessimistic and persons generally, including the participants in this fund and the trustee thereof, were deeply concerned about the safety of their investments. There were almost daily financial failures and frequent defaults by corporations, cities and towns of their interest obligations and investors made frequent changes in an

effort to conserve their property. The company as trustee, not only for this fund but for its other trust accounts, made changes in its investments during 1932 in conformity with those existing conditions.

11. At the beginning of the year 1932 there were fifty-seven persons with agency and trust accounts in the petitioner's trust company who were participants in this fund. They owned 487 units, each having a market value on January 1, 1932 of approximately \$841.68. During that year twenty-one units were withdrawn in this fund by five persons. Two of these persons withdrew their entire investment. The other three withdrew only a portion of their investment. During that year the petitioner made twenty-nine sales representing thirteen different bonds at a total selling price of \$144,500.90. On these sales a net loss of \$6,460.42 was sustained. An itemized list of the sales with the description of the bonds sold, the date of sale and the proceeds of sale is attached hereto as Exhibit "B".

12. During the year 1932 twenty-three persons who were not participants in this fund at the beginning of the year became participants therein in the manner set forth in the agreement of April 1, 1930. To these persons and nine of those who were already participants at the beginning of the year there were issued 129 units in the manner set forth in the agreement of April 1, 1930. By the end of the year 1932 there were 78 participants in the fund with 595 units, each having a market value on December 31, 1932 of approximately \$889.02. To invest these funds and the funds realized from sales made the petitioner during the year 1932 made six

ty-six purchases of twenty-six different bonds, some of which were obligations of the same corporation or city but with a different interest rate or different maturity. These purchases were made at a total cost of \$246,615.07. An itemized list of the purchases with a description of the bond purchased, the date of purchase and the total purchase price is attached hereto as Exhibit "C".

13. On March 15, 1933, the Germantown Trust, acting as trustee under the aforesaid agreement, filed on behalf of the aforesaid Germantown Trust Company Bond Investment Fund a so-called "Fiduciary Return of Income" on Form 1041 for the calendar year 1932, with the Collector of Internal Revenue of the First District of Pennsylvania. A photostatic copy of the aforesaid return is attached hereto as Exhibit "D" and made a part hereof. The return filed discloses the receipt in 1932 of interest on bank deposits, notes, bonds, etc., in the amount of \$29,309.09.

14. The petitioner never has filed a return on Form 1120 for the year 1932. On September 17, 1936, there was prepared by the respondent a so-called "Substitute Return" for the petitioner herein on Form 1120 (corporation income tax return) for the year 1932. A photostatic copy of the aforesaid return is attached hereto as Exhibit "E" and made a part hereof.

15. The individual participants in the fund who were required to make a Federal individual income tax return for 1932 for the amounts of the distributed and/or distributable income of the petitioner for the year 1932, have included in their respective returns the share of the said income as disclosed on

Stipulation of Facts
Exhibit A

the schedule attached to Exhibit "D". The last date on which any participant of this fund filed his income tax return for the year 1932 was, for the purpose of this proceeding on March 15, 1933.

16. On or about July 8, 1936, a revenue agent for the respondent recommended that the petitioner be taxed as a corporation as defined by Section 1111(2) of the Revenue Act of 1932, and Article 1312 of Regulations 77. A copy of said agent's report was furnished the petitioner under date of July 21, 1936.

17. On February 27, 1937, the respondent mailed a notice of deficiency to the petitioner herein, stating, among other things, that the petitioner was "during the year 1932 * * * operating as a corporation as defined by Section 1111(2) and Article 1312, Regulations 77, Revenue Act of 1932;" a copy of said "notice" is attached to the petition filed in this proceeding.

PAUL F. MYERS,
Counsel for Petitioner.

(Sgd.) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue

EXHIBIT A

THIS AGREEMENT, to be known as GERMAN-TOWN TRUST COMPANY BOND INVESTMENT FUND AGREEMENT, is made on April 1, 1930 by and among GERMANTOWN TRUST

Stipulation of Facts
Exhibit A

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COMPANY, hereinafter called the Company, as trustee hereunder, and such persons as shall from time to time assent thereto in the manner hereinafter set forth, which persons are hereinafter called Participants.

The purpose of this agreement is to form a single fund of high-grade bonds, to be known as GFR-MANTOWN TRUST COMPANY BOND INVESTMENT FUND, hereinafter called the Fund, in which persons for whom the Company shall hold securities as agent, shall have undivided interests. The purpose is to make substantially permanent conservative investments, although changes in the bonds may be necessary or wise from time to time.

1. ISSUING OF SHARES

On the date hereof, each original participant shall deposit with the Company as trustee hereunder one thousand dollars (\$1000) for each undivided share of the Fund in which he shall invest and the Company shall promptly invest all such deposits as hereinafter provided. New shares of the Fund may be issued by the Company at any time. For the issuing of each such new share there shall be required a deposit with the Company of a sum equal to the total value of all the assets of the Fund, divided by the number of shares outstanding in the hands of participants at the close of business on the next preceding day of business. Such value shall be fixed by the Company as of the close of the said next preceding day of business. There shall also be required for the issuing of each such new share a payment to the income account of the Fund equal to the income accrued on each prior share to the

Stipulation of Facts
Exhibit A

day of issuing such new share, but not distributable on that day.

2. INVESTMENTS

The Company shall promptly invest and shall re-invest and keep constantly invested the deposits so made with it by participants, confining itself to investments in corporate bonds and to bonds issued by a nation or by a political subdivision thereof. But the Company may take or purchase other securities or property in a reorganization in exchange for such bonds or by virtue of a privilege of conversion given by such bonds.

3. INCOME

The Company shall collect the income of the Fund promptly as it shall become due, and shall on the first day of each January, April, July and October credit each participant with his proportionate share thereof, according to the number of his shares in the Fund. Pending such distribution, the income of the Fund shall be deposited in a separate account and the interest on such deposit account shall also be credited proportionately to the participants.

Except as herein otherwise provided, all profits derived from the sale or exchange of securities shall be treated as principal and shall remain in the Fund.

4. CERTIFICATE.

For each deposit a participant shall receive from the Company a certificate of participation in the Fund signed by the president or by a vice-president of the Company and by the secretary or by an assistant secretary of the Company and sealed with

Stipulation of Facts
Exhibit A

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the Company's seal. This certificate shall remain in the custody of the Company as part of the securities of such participant's account. The Company may at any time, in its sole discretion, increase or decrease the number of shares into which the Fund shall be divided, and shall in each case cancel all outstanding certificates and shall issue to each participant a certificate or certificates for such participant's proportionate number of shares according to such increase or decrease. Each certificate shall be in the following form:

GERMANTOWN TRUST COMPANY BOND INVESTMENT FUND

This certifies that _____ is the owner of _____ shares of Germantown Trust Company Bond Investment Fund, subject to the provisions of an agreement dated April 1, 1930 among Germantown Trust Company, Trustee, and the participants in such Fund, a copy of which agreement is on file at the office of Germantown Trust Company.

Executed on _____, 19 _____

Germantown Trust Company

By _____, President.

Attest: _____, Secretary.

(Corporate Seal)

5. WITHDRAWAL OF SHARES.

The said certificates shall not be transferable. A share or any number of shares may be withdrawn on any quarterly day, which shall be the first days of January, April, July and October (or the next succeeding day of business, if any of these shall fall

Stipulation of Facts
Exhibit A

on a Sunday or legal holiday) in the following manner: If and when a participant or his legal representatives shall notify the Company in writing that all or part of his shares are to be withdrawn from the Fund, the Company shall, on the next quarterly day occurring not less than ten days after the receipt of such notice in writing, pay such participant or his legal representatives the then value of such shares in cash taken from the Fund, and shall cancel his certificates, issuing to him a new certificate for his remaining share or shares, if there be any not withdrawn. The value of each share on a quarterly day shall be fixed as hereinabove provided with respect to the issuing of new shares.

6. ASSENT OF PARTICIPANTS.

The assent hereto of each participant shall be evidenced by his signature to a letter in substantially the following form:

"I hereby authorize Germantown Trust Company to invest for me certain cash and/or the proceeds of certain securities in shares of Germantown Trust Company Bond Investment Fund in accordance with an agreement dated April 1, 1930 by and among Germantown Trust Company and such persons as shall from time to time assent thereto, which agreement is known as Germantown Trust Company Bond Investment Fund Agreement. The said cash and/or proceeds of securities are set forth in the schedule attached hereto."

The said schedule shall state the cash to be so invested and/or the securities to be sold, with the terms of such sale.

7. POWERS AND DUTIES OF TRUSTEE.

In the exercise of its powers and duties as trustee, the Company shall be subject to the following provisions:

(1) **INVESTMENTS:** It shall have power in its uncontrolled discretion and from time to time (a) to invest in bonds, as above provided, and to charge any premium paid therefor to income or to principal as it shall deem best; (b) to buy and sell the bonds, stocks and other assets of the Fund for such prices and on such terms as it shall think best; (c) to enter into any plan of reorganization with respect to bonds, stocks or other securities forming part of the Fund, and in the execution thereof to pay any money, receive any other bonds, stocks or other securities or assets, and take any other action which it shall deem best; (d) to hold or dispose of stock dividends and rights to subscribe to stock as it shall think best, and to allot such dividends or the proceeds thereof to principal or to income.

(2) **TITLE TO ASSETS:** It shall have legal title to all the securities, cash and other assets of the Fund and may cause such securities to be registered in its name without designation, that it hold such securities in a fiduciary capacity, but in that event shall execute and place with the securities of the Fund a declaration that it holds such securities as trustee for the Fund.

(3) **CUSTODY AND ACCOUNTS:** It shall keep all the securities, cash and other assets of the Fund separate from all other securities, cash and assets, and shall keep true and accurate accounts of all transactions on account of the Fund.

Stipulation of Facts
Exhibit A

(4) **NO PROFITS TO COMPANY:** It shall perform the duties of trustee hereunder without profit to itself and shall not become a participant hereunder. This shall not prevent the Company from charging the participants for its services to them as agent.

(5) **INFORMATION TO PARTICIPANTS:** It shall, on request by any participant at any time, give to such participant full information about the Fund and about the securities in which the Fund shall be invested. It shall annually, as soon as possible after January 1, send to each participant a statement of the condition of the Fund, and a statement as to such participant's share in income and in profits or losses from sales or exchanges of principal.

(6) **TAXES:** It shall pay such taxes as it shall be required to pay because of its trusteeship and shall, in the distribution of income hereunder, charge such taxes equitably against the several participants.

(7) **TERMINATION:** It may, at any time, in its sole discretion, terminate the trust in whole or in part by disposing of all or part of the assets of the Fund and distributing the proceeds thereof pro rata among the participants. It may also, at any time on giving ten days' written notice to a participant, cancel all of his shares, paying him the value of such shares fixed as provided herein with respect to the withdrawal of shares.

(8) **LIABILITY:** It shall be liable only for the exercise of the ordinary care and diligence required of a trustee.

Stipulation of Facts
Exhibit A

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8. AMENDMENTS.

The Company may at any time send a written notice to each participant, stating a proposed amendment to this agreement. Such a notice shall be mailed to the address of the participant last known to the Company. After sixty days from such mailing the proposed amendment shall become effective with respect to every participant who shall not have notified the Company in writing that he objects to it.

In witness whereof, the Germantown Trust Company has hereunto caused its corporate seal to be affixed, attested by its secretary and these presents to be signed by its president, dated the first day of April, 1930.

GERMANTOWN TRUST COMPANY

By **Sg. C. S. SMYTH.**
President.

Attest:

Sg. JAMES A. KELLY.
Secretary.

(Corporate Seal)

*Order***ORDER**

(Filed Jan. 18, 1939)

Upon consideration of the motion filed hereby by counsel for petitioner, and assented to by counsel for respondent, with reservation as to venue herein, moving the Court to permit the transmission to this Court of copies of Exhibit "D" of the Stipulation of Facts, exclusive of the schedules thereto attached, and Page 1 of Exhibit "E" of said Stipulation of Facts, as physical exhibits, not to be included in the printed record on review, it is by the Court this 17 day of January, 1939

Ordered that the said motion be and is hereby granted.

And it is further ordered that the Clerk of this Court transmit a certified copy of this order to the Clerk of the United States Board of Tax Appeals to be by him incorporated in the record on review.

By the Court,

(s) ALBERT B. MARIS.
Circuit Judge.

RFS-spt 1-12-39

Received and Filed Jan. 17, 1939.
Wm. P. Rowland, *Clerk.*

PRAECIPE FOR RECORD

(Filed Jan. 21, 1939)

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Third Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board,

(a) Petition (including deficiency letter, but excluding Exhibit "B");

(b) Answer;

(c) Reply.

3. Memorandum opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Stipulation of Facts, including Exhibit "A", but excluding Exhibits "B", "C", "D" and "E". (Exhibits "D" and "E", in so far as material, to be transmitted with the transcript

Praeipice for Record

of the record on review, as physical exhibits, as per Court order).

6. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record. (Not included in record)

7. This praecipe:

(Signed) J. P. WENCHEL,
RLW

*Chief Counsel, Bureau of
Internal Revenue.*

Service of a copy of the within praecipe is hereby admitted this 13 day of January, 1939.

(Sgnd) PAUL F. MYERS,
*Attorney for Respondent
on Review.*

RFS-spt 1-5-39

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 46, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 30th day of January, 1939.

B. D. GAMBLE,
Clerk,

*United States Board of Tax
Appeals.*

(Seal)

[fol. 48] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 6989

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

VS.

GERMANTOWN TRUST COMPANY, Trustee of Germantown
Trust Company Bond Investment Fund, Respondent

And afterwards, to wit, the 13th day of April, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable William Clark and Honorable Francis Biddle, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 14th day of July, 1939, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 49] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 6989

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

V.

GERMANTOWN TRUST COMPANY, Trustee Germantown Trust
Co. Bond Investment Fund, Respondent

Petition for Review from the United States Board of Tax
Appeals

OPINION—Filed July 14, 1939

Before Biggs, Clark and Biddle, Circuit Judges

BIDDLE, Circuit Judge:

This appeal from the Board of Tax Appeals involves two questions: Whether this court has jurisdiction; and whether the period for assessing the tax is governed by Section 275

(a) or 275 (c) of the Revenue Act of 1932. We shall consider them in that order.

The taxpayer is the trustee. Germantown Trust Company Bond Investment Fund was formed by Germantown Trust Company, a Pennsylvania trust company, under an agreement dated April 1, 1930, by which the trust company acted as trustee by investing the money of persons deposited with it in diversified securities, in which they secured undivided shares, represented by certificates issued to them by the trustee. On March 15, 1933, the trust company, as trustee, filed for the Fund a "Fiduciary Return of Income" on Treasury Form 1041, on behalf of the trust estate, for the calendar year 1932, with the Collector of Internal Revenue for the First Collection District of Pennsylvania. It did not file a corporation income tax return. The fiduciary return disclosed net taxable income of \$26,570.58, which was included by the participants in the fund in their individual tax returns, of which the last was filed on March 15, 1933. On February 27, 1937, the Commissioner of Internal Revenue mailed a notice of deficiency to the trustee and the Fund, basing the deficiency on the ground that during the year 1932 the Fund was operating as a corporation as defined by Section 1111 (2) and Article 1312, Regulations 77, Revenue Act of 1932. On petition by the taxpayer the Board of Tax Appeals held that assessment of the deficiency was barred by Section 275 (a).

Jurisdiction

Section 1002 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 110, as amended by the Act of 1934, c. 277, 48 Stat. 760 (26 U. S. C. 641), provides: "Except as provided in subdivision (b), such decision (of the Board of Tax Appeals) may be reviewed by the Circuit Court of Appeals for the circuit in which is located the Collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia."

Was a return of tax filed in this case so as to give this court jurisdiction? We can find no basis for distinguishing between a fiduciary return and a corporation income tax return, so far as jurisdiction is concerned. Both are tax returns, though one may be accompanied by payment, and both involve a definite act on which jurisdiction may be hung. Both are returns "of the tax in respect of which

[fol. 51] the liability arises". If the Fund is taxable the tax is based on the information shown in the Fiduciary Return. It is spoken of as a "return" by Sec. 142 of the Act¹: "Requirement of return.—Every fiduciary . . . shall make under oath a return . . . for any of the following individuals, estates, or trusts for which he acts . . ." The distinction becomes irrational for this purpose. It is only when no act is performed by the taxpayer, no return of any kind made, that it becomes necessary to set up jurisdiction elsewhere.

Period of Limitation

Section 275 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169 (26 U. S. C. 275) reads: "General Rule.—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

275 (c) reads: "Corporation and Shareholder.—If a corporation makes no return of the tax imposed by this title but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed."

Section 276 (a) of the Act (26 U. S. C. 276) reads as follows; "False return or no return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

It will be seen that there are three classes of limitations. Where a return is filed, the assessment must be made in two years. Where no return is filed, or where the return is false, there is no period of limitation. But where the cor- [fol. 52] poration files no return but its shareholders do, the period is four years from the last date on which any shareholder's return was filed. This section of course does not apply where a corporation makes no return and its shareholders include its dividends in their return. It looks to a case only where the corporation makes no return and each

¹ Revenue Act of 1932, c. 209, 47 Stat. 214, 26 U. S. C. 142.

of its shareholders includes "his distributive share of the net income." Shareholders do not ordinarily include "distributive shares"; ordinarily they return dividends. When, however, they believe that the entity is not a corporation but a fiduciary, liable only to file a fiduciary return, there are no dividends, and they return their distributive shares, as shown by the fiduciary return. It is hard to imagine their returning such distributive shares without the fiduciary return, from which they obtain the necessary information.

It is difficult to conceive, therefore, how Section (c) could apply except where a fiduciary return is made, as in this case, by the entity, imagining itself to be a fiduciary, but perhaps later determined to be a corporation. The section must be meant to apply to a case where this entity fails to make a corporation return but makes only a fiduciary return. Then the longer period of four years permits the government to determine whether the grouping of individuals in the particular form used creates a liability in addition to and separate from that of the individuals—a corporate liability—often a difficult and close question, and largely unsettled in 1934. If this were otherwise, and the section not directed to this very situation, why a four year limitation?

This intention as shown in the report of the Ways and Means Committee of the House on the 1926 Act, in which the provision first appeared as Section 277 (a) (5)²: "This section provides that if a corporation makes no return of the tax imposed by this bill, but each of the shareholders includes in his return his distributive share of the net income [fol. 53] of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed. This provision is limited to taxes imposed under this bill, and it is incorporated in the bill to make certain that if in the future the beneficiaries of a trust or the members of an association include their distributive share in their income tax return, and if at a later date it should be held that the trust or association is subject to the corporation tax and should have made the return, the statute of limitations as applied to the trust or association shall run from the dates above specified." The Senate Committee repeated this explanation.³ It was natural that the Commissioner should be given a

² H. Rep. No. 1, 69th Cong., 1st Sess. p. 11.

³ S. Rep. No. 52, 69th Cong., 1st Sess., p. 28.

longer period for assessment at that time, when the considerations making associations taxable as corporations had not been established by the Supreme Court.

We are of course familiar with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Roosevelt & Son Inv. Fund*, 89 F. (2d) 706, that it did not have jurisdiction, not passing on the other question, and dismissing the appeal. Similar facts were presented. The court thought that "return of the tax" must carry the same meaning in the venue section as in the limitation sections.⁴ But courts have not felt it necessary to invoke such rigid consistency where different meanings were evidently intended for the same words. See *Helvering v. British-American Tobacco Co.*, 69 F. (2d) 528, 530 (C. C. A. 2d), affirmed 293 U. S. 95; *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 86-88. The context of words may affect their meanings. The kind of return required by classification for jurisdiction need not be the same as the return which will start a period of limitation.

We decide therefore that we have jurisdiction; that section 275 (c) is applicable; and that the decision of the Board [fol. 54] of Tax Appeals must be reversed. The record is remanded to the Board of Tax Appeals with the direction to determine the Taxpayer's appeal on the merits.

A true Copy:

Teste:

_____, Clerk of the United States Circuit Court
of Appeals for the Third Circuit.

[fol. 55] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 6989

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

GERMANTOWN TRUST Co., Trustee Germantown Trust Co.
Bond Investment Fund, Respondent

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

⁴ Sections 275 (a) and (c) of the Revenue Act of 1928, identical with those we are considering.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby reversed, and the cause remanded to the said Board of Tax Appeals with direction to determine the taxpayer's appeal on the merits.

Philadelphia, July 14, 1939.

Francis Biddle, Circuit Judge.

Endorsements: Order Reversing Decree etc. Received & Filed Jul. 14, 1939. William P. Rowland, Clerk.

(Here follow 3 photolithographs, side folios 56-58.)

**EXHIBIT "D" of Stip. Facts, exclusive of schedules
attached thereto.**

<p style="font-size: small;">Form 1041 TREASURY DEPARTMENT INTERNAL REVENUE SERVICE</p> <p style="font-size: x-small;">(Auditor's Stamp)</p> <p style="text-align: right; font-size: small;">JAN 2 1934</p>	<h2 style="margin: 0;">FIDUCIARY RETURN OF INCOME</h2> <h3 style="margin: 0;">For Calendar Year 1932</h3> <p style="font-size: x-small;">Or Fiscal Year began _____, 1931, and ended _____, 1932</p> <p style="font-size: x-small;">File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year (PRINT NAMES AND ADDRESS PLAINLY BELOW)</p> <p>Name of Estate or Trust GERMANTOWN TRUST COMPANY - BOND INVESTMENT FUND -</p> <p>Name and Address of Fiduciary GERMANTOWN TRUST COMPANY GERMANTOWN & CHELSEA AVENUES GERMANTOWN, PHILA., PA.</p>	<p style="font-size: x-small;">Do Not Write in These Spaces</p> <p style="font-size: large; font-weight: bold;">539</p> <p style="font-size: large;">953718</p> <p style="font-size: x-small;">State _____</p> <p style="font-size: x-small;">(Date Received)</p>
---	---	---

1. Was a return of income for 1932 filed on behalf of the estate or trust named above?	Yes
2. If so, to what collector's office was it sent? (Give district or city and State)	1st Pa.
3. Give date of creation of trust or decedent's death	April 11 1930
4. State whether books are kept on cash or accrual basis	Cash

INCOME	
1. Net profit from Trade or Business. (From Schedule A)	
2. Interest on Bank Deposits, Notes, and Corporation Bonds, etc. (except interest on tax-free covenant bonds)	14251.59
3. Interest on Tax-free Covenant Bonds upon which a tax was paid at source	15057.50
4. Income from Partnerships, Syndicates, Groups, etc., and Fiduciaries: (State name and address)	
5. Rents and Royalties. (From Schedule B)	
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)	
7. Dividends on:	
(a) Stock of Domestic Corporations subject to income tax under Revenue Act of 1932	
(b) Stock of Domestic Corporations not subject to income tax under Revenue Act of 1932	
(c) Stock of Foreign Corporations	
8. Other Income: (State nature of income)	
(a) _____	
(b) _____	
9. TOTAL INCOME IN ITEMS 1 TO 8	29309. 09

DEDUCTIONS	
10. Interest Paid	2628.91
11. Taxes Paid	105.60
12. Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)	
13. Bad Debts. (Explain in Schedule E)	
14. Contributions. (Explain in Schedule E)	
15. Other Deductions Authorized by Law. (Explain in Schedule E)	4.00
16. TOTAL DEDUCTIONS IN ITEMS 10 TO 15	2738. 51
17. NET INCOME (Item 9 minus Item 16)	26570. 58

5. Rents and Royalties. (From Schedule B)		
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)		
7. Dividends:		
(a) Stock of Domestic Corporations subject to income tax under Revenue Act of 1932		
(b) Stock of Domestic Corporations not subject to income tax under Revenue Act of 1932		
(c) Stock of Foreign Corporations		
8. Other Income: (State nature of income.)		
(a)		
(b)		
9. TOTAL INCOME IN ITEMS 1 TO 8		29309. 09
DEDUCTIONS		
10. Interest Paid	2628. 91	
11. Taxes Paid	105. 60	
12. Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)		
13. Bad Debts. (Explain in Schedule E)		
14. Contributions. (Explain in Schedule E)		
15. Other Deductions Authorized by Law. (Explain in Schedule E)	Adm. 4.00	
16. TOTAL DEDUCTIONS IN ITEMS 10 TO 15		2738. 51
17. NET INCOME (From 9 minus Item 16)		26570. 58

BENEFICIARIES' SHARES OF INCOME AND CREDITS
(See Instruction 18)

1. NAME AND ADDRESS OF EACH BENEFICIARY (Designate surviving spouse and nonresident alien)	2. PER- CENTAGE OF BEN- EFICIAL INTEREST	3. DIVIDENDS (Class 7 (a) above, or Item 15, whichever amount is smaller)	4. BALANCE OF NEW INCOME (Class 17 above Item 7 (a))	5. CAPITAL NET GAIN OR LOSS (Schedule D, Column 5)	6. INCOME TAX PAID AT SOURCE (% of Item 3)	7. INCOME TAX AND FOREIGN CREDITS ON UNITED STATES TERRITORIES
(a)						
(b)						
(c)						
(d)						
(e)						
(f)						
(g)						
(h)						
(i)						
(j)						
(k)						
(l)						
(m)						
(n)						
(o)						
(p)						
(q)						
(r)						
(s)						
(t)						
(u)						
(v)						
(w)						
(x)						
(y)						
(z)						
Totals						

NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.
(See Instruction 19)

1. OBLIGATIONS OR BONDS	2. AMOUNT OWNED	3. INTEREST RECEIVED
(a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia		1051.14
(b) Securities issued under the provisions of the Federal Farm Loan Act, or under such Act as amended, Treasury Bills, and Treasury Certificates of Indebtedness		1350.00
(c) Liberty 3½% Bonds and other obligations of U. S. issued before Sept. 1, 1917, and obligations of U. S. possessions		
(d) Liberty 4% and 4½% Bonds and Treasury Bonds		
(e) Treasury Notes		

SCHEDULE A—INCOME FROM TRADE OR BUSINESS (See Instruction 1)

1. Total receipts from trade or business (state kind of business).....		\$	
Cost of Goods Sold			
2. Labor.....	\$	10. Salaries, except "Labor," reported on Line 2.....	\$
3. Material and supplies.....		11. Interest on business indebtedness to others.....	
4. Merchandise bought for sale.....		12. Taxes on business and business property.....	
5. Other costs (itemize below or on separate sheet).....		13. Losses (explain in table at foot of page).....	
6. Plus inventory at beginning of year.....		14. Bad debts arising from sales.....	
7. TOTAL (Lines 2 to 6).....	\$	15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page).....	
8. Less inventory at end of year.....		16. Rent, repairs, and other expenses (itemize below or on separate sheet).....	
9. NET COST OF GOODS SOLD (Line 7 minus Line 8).....	\$	17. TOTAL (Lines 10 to 16).....	\$
Enter "C," or "C or M," on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		18. TOTAL DEDUCTIONS (Line 9 plus Line 17).....	\$
Explanation of deductions claimed on Lines 5 and 16.....		19. NET PROFIT Line 1 minus Line 18 (Enter as item 1).....	\$

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)

1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. COST OR VALUE AS OF MARCH 1, 1913, WHICHEVER GREATER	4. DEPRECIATION (Explain in table at foot of page)	5. REPAIRS	6. OTHER EXPENSES (Itemize below)	7. NET PROFIT (Enter as item 8)

Itemizations of deductions used in Column 6.

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT RECEIVED	4. COST	5. MARCH 1, 1913, VALUE IF ACQUIRED PRIOR TO THAT DATE	6. COST OF IMPROVEMENTS SUBSEQUENT TO ACQUISITION ON MARCH 1, 1913	7. DEPRECIATION ALLOWED (ON ALLOWABLE) SINCE ACQUISITION ON MARCH 1, 1913	8. NET PROFIT OR LOSS (Enter as item 9)
LOVABLE LOSSES ON SALE OF SECURITIES HELD LESS THAN TWO YEARS DIVIDED PROPORTIONATELY AMONG THE PARTICIPANTS AS PER SCHEDULE ATTACHED							LOSS 6460.12

How property acquired.

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 6a)

KIND OF PROPERTY	1. DATE ACQUIRED	2. DATE SOLD	3. AMOUNT RECEIVED	4. COST	5. MARCH 1, 1913, VALUE IF ACQUIRED PRIOR TO THAT DATE	6. COST OF IMPROVEMENTS SUBSEQUENT TO ACQUISITION ON MARCH 1, 1913	7. DEPRECIATION ALLOWED (ON ALLOWABLE) SINCE ACQUISITION ON MARCH 1, 1913	8. NET GAIN OR LOSS (Enter in Column 9, Item 18)
	Mo. Day Year	Mo. Day Year						

How property acquired.

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT REALIZED	4. COST	5. MARCH 1, 1913, VALUE IF ACQUIRED PRIOR TO THAT DATE	6. COST OF IMPROVEMENTS SUBSEQUENT TO ACQUISITION ON MARCH 1, 1913	7. DEPRECIATION ALLOWED (ON ALLOWABLE) SINCE ACQUISITION ON MARCH 1, 1913	8. NET PROFIT OR LOSS (Enter in Col. 8)
ALLOWABLE LOSSES ON SALE OF SECURITIES HELD LESS THAN TWO YEARS DIVIDED PROPORTIONATELY AMONG THE PARTICIPANTS AS PER SCHEDULE ATTACHED							LOSS 6460.12

How property acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 6a)

KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT REALIZED	5. COST	6. MARCH 1, 1913, VALUE IF ACQUIRED PRIOR TO THAT DATE	7. COST OF IMPROVEMENTS SUBSEQUENT TO ACQUISITION ON MARCH 1, 1913	8. DEPRECIATION ALLOWED (ON ALLOWABLE) SINCE ACQUISITION ON MARCH 1, 1913	9. NET GAIN OR LOSS (Enter in Col. 9)
	Mo. Day Year	Mo. Day Year						

How property acquired

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, AND 15

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. KIND OF PROPERTY (buildings, state material of which constructed)	2. DATE ACQUIRED	3. AGE WHEN ACQUIRED	4. PROBABLE LIFE AFTER ACQUISITION	5. COST (Exclusive of Land)	6. MARCH 1, 1913, VALUE IF ACQUIRED PRIOR TO THAT DATE (Exclusive of Land)	7. DEPRECIATION ALLOWED (ON ALLOWABLE) IN FRANK YEARS	8. DEPRECIATION ALLOWABLE THIS YEAR

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 13

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. COST OR VALUE AS OF MARCH 1, 1913, WHENEVER OCCURRED	4. SUBSEQUENT IMPROVEMENTS	5. DEPRECIATION ALLOWABLE SINCE ACQUISITION	6. INSURANCE AND SALVAGE VALUE	7. DEDUCTIBLE LOSS

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and, to the best of my knowledge and belief, is a true and complete return, made in good faith for the accounting and payment to the Revenue Act of 1923 and the Regulations issued thereunder.

Sworn to and subscribed before me this

24th day of March, 1924.
John D. Miller

GERMANTOWN TRUST COMPANY

(Signature of Notary Public or other authorized officer)

NOTARIAL SEAL

(Signature of other authorized officer)

(Title)

(Address of Notary Public or other authorized officer)

See Instruction 24

(An amended return must be plainly marked "Amended" across face of return)

EXHIBIT "E" of Stip. Facts.

Form 1150
TREASURY DEPARTMENT
Internal Revenue Service

CORPORATION INCOME TAX RETURN For Calendar Year 1932

File This Return with the Collector of Internal Revenue for Your District on or Before March 31, 1933.

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

GERMANTOWN TRUST COMPANY

GERMANTOWN & CHELSEA AVENUES

GERMANTOWN, PHILA., PA.

(Post Office and State)

File Separately, Except Where Otherwise Provided in the Instructions, That This Form be Completely Filled Out in Respect of any Statement, Schedule, or Report Submitted Herewith.

Date of Incorporation

Association 4/4/20

Under the Laws of what State or Country

The Corporation's Books are in Care of

Located at

Kind of Business

Is This a Consolidated Return of Two or More Corporations?

If so, How Many?

GROSS INCOME

1. Gross Sales (where inventories are an income-determining factor), \$ 29,309.09; Less Returns and Allowances, \$ 0; Net Sales, \$ 29,309.09

2. Less Cost of Goods Sold:

(a) Inventory at beginning of year

(b) Material or merchandise bought for manufacture or sale

(c) Miscellaneous costs (From Schedule A, Column 1):

(1) Salaries and wages, \$ 2,100.00

(2) Other costs, \$ 0

(d) Total of lines (a), (b), and (c)

(e) Less inventory at end of year

3. Gross Profit from Sales (Item 1 minus Item 2)

4. Gross Receipts (where inventories are not an income-determining factor)

5. Less cost of operations (From Schedule A, Column 2):

(a) Salaries and wages, \$ 2,100.00

(b) Other costs, \$ 0

6. Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5)

7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.

8. Rents

9. Royalties

10. Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule B)

11. Dividends on:

(a) Stock of Domestic Corporations subject to taxation under Title I of Revenue Act of 1932

(b) Stock of Domestic Corporations not subject to taxation under Title I of Revenue Act of 1932

(c) Stock of Foreign Corporations

12. Other Income (State nature of income):

(a)

Page 1 of Return

269

Serial Number

Check Number

Check Number

(Cashier's Stamp)

Cash

Check

M. O.

Cart. of Ind.

First Payment

ATTACH REMITTANCE HERE

A B M. res

9-17-36

X

ATTACH HERE

3. Gross Profit from Sales (Item 1 minus Item 2)									
4. Gross Receipts (where inventories are not an income-determining factor)									
5. Less cost of operations (From Schedule A; Column B)									
(a) Salaries and wages, \$									
(b) Other costs, \$									
Total									
6. Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5)									
7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.									
8. Rents									
9. Royalties									
10. Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule E)									
11. Dividends on:									
(a) Stock of Domestic Corporations subject to taxation under Title I of Revenue Act of 1932									
(b) Stock of Domestic Corporations not subject to taxation under Title I of Revenue Act of 1932									
(c) Stock of Foreign Corporations									
12. Other Income (State nature of income):									
(a)									
(b)									
13. TOTAL INCOME IN ITEMS 3, AND 6 MINUS DEDUCTIONS									
14. Compensation of Officers (From Schedule C)									
15. Rent on Business Property									
16. Repairs (From Schedule D); Salaries and Wages, \$									
Other Costs, \$									
Total									
17. Interest									
18. Taxes (From Schedule E)									
19. Losses (From Schedule F)									
20. Bad Debts (From Schedule G)									
21. Dividends (From Schedule H)									
22. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule D)									
23. Depletion of Mines, Oil and Gas Wells, Lumber, etc. (Submit schedule, see Instruction 20)									
24. Other Deductions Not Reported Above (Explain below, or on separate sheet)									
(a) Salaries and wages. (Not included in Item 2, 5, 14, or 16 above)									
(b)									
(c)									
(d)									
25. TOTAL DEDUCTIONS IN ITEMS 14 TO 24									
26. NET INCOME (Item 13 minus Item 25)									
27. LESS: NET LOSS FOR 1931 (Submit schedule)									
28. NET INCOME FOR TAX COMPUTATION (Item 26 minus Item 27)									

COMPUTATION OF TAX

29. Net Income (Item 28 above)									
30. Income Tax (13 1/2% of Item 29) (or 14% of Item 29, if this is a consolidated return)									
31. Less: Income Tax Paid at Source. (This credit can only be allowed to a nonresident foreign corporation)									
32. Income Tax Paid to a Foreign Country or United States possession by a domestic corporation (See Instruction 30)									
33. Balance of Tax (Item 30 minus Items 31 and 32)									

An amended return must be marked "Amended" at top of return.

Checks and drafts will be accepted only if payable at par.

[fol. 59] UNITED STATES OF AMERICA,
 Eastern District of Pennsylvania,
 Third Judicial Circuit *et.:*

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court; and Exhibit "D" of Stipulation of Facts, exclusive of schedules attached thereto; and Page 1 of Exhibit "E" of Stipulation of Facts, in the case of Commissioner of Internal Revenue, petitioner, vs. Germantown Trust Company, Trustee Germantown Trust Company Bond Investment Fund, respondent, No. 6989, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 20th day of September in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the United States the one hundred and sixty-fourth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES

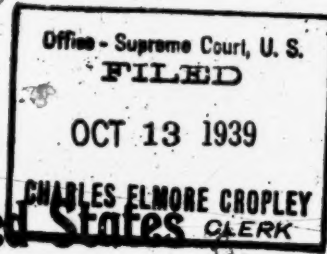
ORDER ALLOWING CERTIORARI—Filed November 13, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

FILE COPY



IN THE
Supreme Court of the United States

October Term, 1939.

No. 462.

GERMANTOWN TRUST COMPANY, Trustee of the
Germantown Trust Company Bond Investment Fund,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit and Brief in
Support Thereof.

SHIPPEN LEWIS,
HAROLD EVANS,
Philadelphia, Pa.,
PAUL F. MYERS,
Washington, D. C.,
Counsel for Petitioner.

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IN THE
Supreme Court of the United States.

No. October Term, 1939.

**GERMANTOWN TRUST COMPANY, TRUSTEE OF THE
GERMANTOWN TRUST COMPANY BOND INVESTMENT
FUND,**

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, Germantown Trust Company, Trustee of the Germantown Trust Company Bond Investment Fund respectfully prays that a writ of certiorari be granted to remove into your Honorable Court for review an order of the Circuit Court of Appeals for the Third Circuit entered July 14, 1939, reversing a decree of the United States Board of Tax Appeals in favor of the petitioner above named.

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.**(a) The Decrees Below.**

Respondent, the Commissioner of Internal Revenue, determined a deficiency in petitioner's federal income tax for 1932, claiming petitioner was an association taxable as a corporation instead of as a trust. Petitioner filed a petition with the United States Board of Tax Appeals for a redetermination of the deficiency, asserting (1) it was taxable as a trust and not as an association, and (2) the two year statute of limitations from the time the "return" was filed had run against the assessment and collection of the deficiency under Section 275(a) of the Revenue Act of 1932. The Board of Tax Appeals, as set forth in its memorandum opinion entered August 24, 1938, ordered and decided there was no deficiency, for this statute applied and the limitation had run. As this disposed of the case, the Board did not discuss or decide the other issue. The Commissioner appealed to the Circuit Court of Appeals for the Third Circuit and to the Circuit Court of Appeals for the District of Columbia. The case first came before the Third Circuit Court, which decided it had jurisdiction under Section 1002(a) of the Revenue Act of 1926, as amended (26 U. S. C. A. 641), and, reversing the Board's decision on the statute of limitations, held that the four year limitation under Section 275(c) of the Revenue Act of 1932 applied rather than the two year limitation under Section 275(a) and remanded the record to the Board, directing it to determine the petitioner's appeal on the merits.

(b) The Questions Presented.

The questions presented to the Circuit Court of Appeals for the Third Circuit on the Commissioner's appeal from the decree of the Board of Tax Appeals and the questions for review before this Court are:

(1) Whether venue to review the decision of the Board of Tax Appeals was in the Third Circuit Court or in the Circuit Court of Appeals for the District of Columbia; that is, was the fiduciary return of income on treasury form 1041 "the return of the tax in respect of which the liability arises" or "no return" under Section 1002(a) of the Revenue Act of 1926, as amended.

(2) Whether the "fiduciary return of income" on Treasury Form 1041 was "the return" specified in Section 275(a) of the Revenue Act of 1932 so that the assessment and collection of the proposed tax deficiency was barred.

(3) Whether a "fiduciary return of income" on Treasury Form 1041 can be a "return" that decides the venue on the appeal under Section 1002(a) of the Revenue Act of 1926 as amended, and not be the "return" that starts the running of the period of limitations under Section 275(a) of the Revenue Act of 1932. Does the word "return" have a different meaning in these two Sections?

(c) The Statutes Involved.

The question of venue to review the decision of the Board of Tax Appeals involves Section 1002(a) of the Revenue Act of 1926, c. 27, 44 Stat. 110, as amended by Section 519, Act of 1934, c. 277, 48 Stat. 760 (26 U. S. C. A. 641).

The power of the Commissioner to assess a deficiency in petitioner's 1932 federal income tax involves Section 275(a), and 275(c) of the Revenue Act of 1932, c. 209, 47 Stat. 237.

Summary Statement of Matter Involved

These statutes are set forth in the appendix to the brief at pages 1a-3a.

(d) Statement of Facts.

The Germantown Trust Company, by agreement dated April 1, 1930 (R. 36), formed The Germantown Trust Company Bond Investment Fund, and has since operated it according to the terms of the agreement (R. 31).

The Company, as trustee, filed for the Fund "Fiduciary Returns of Income" on Treasury Form 1041 (furnished for use by trustees) for the years 1930 and 1931. The Commissioner accepted these returns, and the Fund was taxed for these years as a trust, and not as a corporation.

On March 15, 1933, the Company, as trustee, filed for the Fund a "Fiduciary Return of Income" on Treasury Form 1041 for the calendar year 1932 with the Collector of Internal Revenue of the First District of Pennsylvania at Philadelphia (R. 35, 53a-53b). The petitioner did not file a "Corporation Income Tax Return" on Treasury Form 1120 for this year (R. 35). On September 17, 1936 the respondent prepared a so-called "Substitute Return" for the petitioner on Treasury Form 1120 for 1932 (R. 35, 53c).

The individual participants in the Fund who were required to make federal individual income tax returns for 1932 for the amounts of the distributed or distributable income of the petitioner for the year 1932 included in their respective returns, filed on or before March 15, 1933, their shares of the income disclosed on the schedule attached to the fiduciary return of income (R. 35, 36). The Commissioner on February 27, 1937 mailed a notice of a deficiency to petitioner claiming that petitioner was an association taxable as a corporation instead of a trust, for the year 1932 (R. 8, 36). This notice was mailed to the petitioner more

than two years after the return on Form 1041 was filed by the petitioner as trustee, but less than four years after March 15, 1933, the last date on which any participant in the Fund filed his 1932 individual return for the purposes of this case (R. 35, 36). The first notice petitioner had of the Commissioner's new position was the recommendation on or about July 8, 1936 of an internal revenue agent that the Fund be taxed as a corporation (R. 36).

A petition for a redetermination of this deficiency was filed with the Board of Tax Appeals on May 22, 1937 (R. 4-7). The decrees of the Board and of the court below have been outlined above in (a) The Decrees Below, and for the sake of brevity are not repeated.

II. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The decision of the Circuit Court of Appeals a review of which is sought is in conflict with the decision rendered by the Circuit Court of Appeals for the Second Circuit, in the case of *Commissioner v. Roosevelt and Son Investment Fund*, 89 Fed. (2d) 706 (1937), which involved the same questions of law.

(2) The question whether venue to review a decision of the Board of Tax Appeals is in the Circuit Court of Appeals for the District of Columbia or in the Circuit Court of Appeals for the circuit in which is located the office of the Collector of Internal Revenue with which was filed a "Fiduciary Return of Income" under Section 1002(a) of the 1926 Revenue Act as amended involves an important question of federal law which has not been, but should be, settled by this Court.

(3) The question whether a "Fiduciary Return of Income" on Treasury Form 1041 can be the "return" that decides the venue on the appeal under Section 1002(a) of the Revenue Act of 1926 as amended, and not be the "return" that starts the running of the period of limitations under Section 275(a) of the Revenue Act of 1932, that is, does the word "return" have a different meaning in these two Sections, involves an important question of federal law which has not been, but should be, settled by this Court.

Wherefore your petitioner prays that this petition be granted and that a writ of certiorari issue to the Circuit Court of Appeals for the Third Circuit to review the questions hereinabove stated.

GERMANTOWN TRUST COMPANY
TRUSTEE OF THE GERMANTOWN TRUST
COMPANY BOND INVESTMENT FUND.

By C. S. SMYTH,
Vice-President.

SHIPPEN LEWIS,
HAROLD EVANS,
Philadelphia, Pa.
PAUL F. MYERS,
Washington, D. C.,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES.

No. October Term, 1939.

*Germantown Trust Company, Trustee of the Germantown
Trust Company Bond Investment Fund,*

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.

A. OPINIONS OF THE COURTS BELOW.

The memorandum opinion of the Board of Tax Appeals is printed in the Record, pp. 16 to 17, inclusive. It is not reported in the official reports of the Board.

The opinion of the Circuit Court of Appeals is printed in the Record at pp. 48 to 53, inclusive, and has been reported in 106 Federal Reporter (2d Series) 139.

B. JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on July 14, 1939 (R. 53).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. 347), as amended by the Act of February 13, 1925, 43 Stat. 938.

8 Statement of Case—Specifications of Error—Argument

C. CONCISE STATEMENT OF THE CASE.

The summary statement of the matters involved, supra, pages 2-5, sets forth the relevant facts material to the consideration of the questions presented on the present petition.

D. SPECIFICATIONS OF ERROR.

A specification of the errors intended to be argued has been given in the petition on page 3 under the heading "Summary Statement of the Matter Involved, (b) The Questions Presented" and in the interest of brevity it is not repeated here.

E. ARGUMENT.

1. Brief Statement of Facts.

Germantown Trust Company is a trust company organized and existing under the laws of the State of Pennsylvania. It conducts a trust business involving the handling of all forms of trust estates and also acts as agent for various individuals and corporations in the custody, handling and management of their investments. In order to afford persons of small means the advantage of investing funds in diversified high grade bonds without delay and undue expense and under conditions which would permit of ready liquidation of the investments, the Company by agreement dated April 1, 1930, formed The Germantown Trust Company Bond Investment Fund (R. 29-30).

The facts in regard to the establishment and operation of this Fund were covered by stipulation before the Board of Tax Appeals (R. 29-43), and the Board adopted it as its Findings of Fact (R. 16).

The development of the case has been outlined above at "I. Summary Statement of the Matter Involved (a) The Decrees Below, (d) Statement of Facts."

2. The decision of the Circuit Court of Appeals below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit.

In *Commissioner v. Roosevelt and Son Investment Fund*, 89 Fed. (2d) 706 (1937), the Second Circuit Court decided it did not have jurisdiction to review a decision of the Board of Tax Appeals because a "Fiduciary Return of Income" on Treasury Form 1041 filed for the calendar year 1929 was not "a return of the tax in respect of which the liability arises," as required under Section 1002(a) of the Revenue Act of 1926, as amended by the Act of 1934 (26 U. S. C. A. 641). In that case the principal business of the partnership of Roosevelt and Son, which managed that Fund, was "to care for other people's money, acting as Trustee under wills and deeds of trust, and serving as custodian." On March 9, 1934, the Commissioner of Internal Revenue mailed a notice of deficiency stating that the Fund was held to be an association and taxable as a corporation. The notice, as in this case, was mailed more than two years after the return on Form 1041 was filed, but less than four years after the individual returns of the participants were filed. The Board of Tax Appeals, 34 B. T. A. 38, had decided the assessment of the deficiency was barred by the two year statute of limitations in Section 275(a) of the Revenue Act of 1928, and that Section 275(c) of that Act, c. 852, 45 Stat. 856, was not applicable. The wording of these sections is the same as Sections 275(a), 275(c) of the Revenue Act of 1932 involved in this case.

The Circuit Court of Appeals at page 708 stated:

"The petitioner (Commissioner) has invoked the jurisdiction of the court by alleging that the respondent filed a fiduciary information return for the year 1929 with the Collector of Internal Revenue for the Second District of New York and the office of the collector is located within this judicial circuit. Thus the representation is made of jurisdiction by reason of the return filed by respondent on Form 1041. But if these representations be correct, the alleged deficiency is clearly barred by the limitation provisions of Section 275a. If the petitioner concedes that a proper return was filed Section 275c of the statute becomes inapplicable for that section by its terms applies only where no return is made. The petitioner may not assume two inconsistent positions. He has invoked the court's jurisdiction with the representation that a return of tax was filed in the New York Collector's office and now argues for a reversal of the Board's decision on the ground that the alleged deficiency is not barred because no return of the tax was filed by the respondent.

"The truth is that the information return filed by the respondent was not the return of a tax at all but merely detailed the information with which the tax upon the beneficiaries could be computed. It is immaterial in this respect that such a return has been held to prevent the imposition of a penalty (*Hartford-Connecticut Trust Co. v. Bowers*, 34 Fed. 2, 138 (CCA. (2))) or that it contained all the facts by which a computation of the tax could be arrived at. Section 275c is explicit in its reference to the 'return of the tax imposed by this title.' That means just what it says and may not be extended to include an information return which in fact is no tax return at all.

"An absence of jurisdiction is a corollary to what we have just said. If there was no return within Section 275c, which pertains to the tax herein sought to be

assessed, there certainly was no 'return of the tax in respect of which the liability arises . . .'. Consequently the prerequisite to jurisdiction prescribed by Section 1002, as amended, is not fulfilled. It cannot be that there was a return for one purpose but not for another.

"The petition is dismissed for lack of jurisdiction."

In this case the Germantown Trust Company as Trustee filed for the Fund a "Fiduciary Return of Income" on Treasury Form 1041 for the year 1932 on March 15, 1933 (R. 35, 53a-53b). It did not file a corporation income tax return on Treasury Form 1120 (R. 35). The net taxable income disclosed in the fiduciary return was included by the participants of the fund in their 1932 individual federal income tax returns, of which the last was filed March 15, 1933 (R. 35, 36). On February 27, 1937, the Commissioner of Internal Revenue mailed a notice of deficiency to the Trustee stating that the Fund was held to be an association and taxable as a corporation (R. 8, 36). The Court said:

"Was a return of tax filed in this case so as to give this court jurisdiction? We can find no basis for distinguishing between a fiduciary return and a corporation income tax return, so far as jurisdiction is concerned. Both are tax returns, though one may be accompanied by payment, and both involve a definite act on which jurisdiction may be hung. Both are returns 'of the tax in respect of which the liability arises'. If the Fund is taxable the tax is based on the information shown in the Fiduciary Return. It is spoken of as a 'return' by Sec. 142 of the Act: 'Requirement of return.—Every fiduciary . . . shall make under oath a return . . . for any of the following individuals, estates, or trusts for which he acts . . .' The distinction becomes irrational for this purpose. It is

only when no act is performed by the taxpayer, no return of any kind made, that it becomes necessary to set up jurisdiction elsewhere." (R. 49-50.)

"We are of course familiar with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Roosevelt & Son Inv. Fund*, 89 F. (2d) 706, that it did not have jurisdiction, not passing on the other question, and dismissing the appeal. Similar facts were presented. The court thought that 'return of the tax' must carry the same meaning in the venue section as in the limitation sections. But courts have not felt it necessary to invoke such rigid consistency where different meanings were evidently intended for the same words. See *Helvering v. British-American Tobacco Co.*, 69 F. (2d) 528, 530 (CCA 2d), affirmed 293 U. S. 95; *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 86-88. The context of words may affect their meanings. The kind of return required by classification for jurisdiction need not be the same as the return which will start a period of limitation."

"We decide therefore that we have jurisdiction; that section 275(c) is applicable, and that the decision of the Board of Tax Appeals must be reversed." (R. 52.)

These two cases are directly in conflict on the venue issue: whether a "Fiduciary Return of Income" on Treasury Form 1041 is a "return of the tax in respect of which the liability arises" under Section 1002(a) of the Revenue Act of 1926, as amended.

These two cases are directly in conflict upon the construction of the word "return" used in Section 1002(a), as amended, and in Section 275(a) and (c) of the Revenue Acts of 1928 and 1932.

The Second Circuit Court of Appeals held (1) that if the fiduciary return was the "return" specified in Section

1002(a), then it must also be the "return" specified in Section 275(a), and (2) that it was not a return under either Section and therefore the Court did not have jurisdiction. The Court stated,—“It can not be that there was a return for one purpose (jurisdiction) but not for another” (statute of limitations).

The Third Circuit Court of Appeals decided that the fiduciary return was not the "return" specified in Section 275(a), but that it still was the "return" specified for venue under Section 1002(a). The Court said:

“The court (Second Circuit) thought that ‘return of the tax’ must carry the same meaning in the venue section as in the limitation sections. But courts have not felt it necessary to invoke such rigid consistency where different meanings were evidently intended for the same words. See *Helvering v. British-American Tobacco Co.*, 69 F. (2d) 528, 530 (CCA 2d), affirmed 293 U. S. 95; *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 86-88. The context of words may affect their meanings. The kind of return required by classification for jurisdiction need not be the same as the return which will start a period of limitation.” (R. 52.)

3. The question whether venue to review a decision of the Board of Tax Appeals is in the Circuit Court of Appeals for the District of Columbia or in the Circuit Court of Appeals for the circuit in which is located the office of the Collector of Internal Revenue to which was made a “Fiduciary Return of Income,” involves an important question of federal law which has not been, but should be, settled by this Court.

Since the decision of the Second Circuit Court in the case of *Commissioner v. Roosevelt & Son Investment Fund*, *supra*, petitions to review decisions of the Board of Tax Appeals filed by the Commissioner or by a taxpayer in

cases in which only "Fiduciary Returns of Income" on Treasury Form 1041 were filed have had to be taken to both the Circuit Court of Appeals of the District of Columbia and the Circuit Court of Appeals for the circuit in which was located the office of the Collector of Internal Revenue to which the "return" was made. If this were not done, and the appeal was filed only with the Circuit Court of Appeals for the circuit in which the Collector's office was located and that Court decided as the Second Circuit Court did, that it did not have jurisdiction to review the Board's decision as no "return" had been filed, the appellant's right to appeal to the Circuit Court of Appeals for the District of Columbia was lost as the three months period within which to file the petition would ordinarily have expired. The converse of this situation would also be true if an appeal had been filed only with the Circuit Court of Appeals for the District of Columbia. The appellant had thus lost his remedy, and had no redress by appeal.

4. The question whether a "Fiduciary Return of Income" on Treasury Form 1041 can be the "return" that decides the venue on the appeal under Section 1002(a) of the Revenue Act of 1926 as amended, and not be the "return" that starts the running of the period of limitations under Section 275(a) of the Revenue Act of 1932, that is, does the word "return" have a different meaning in these two Sections, involves an important question of federal law which has not been, but should be, settled by this Court.

Organizations that had considered themselves to be and had been considered by the Commissioner to be trusts filed "Fiduciary Returns of Income" on Treasury Form 1041 and did not file corporation income tax returns on Form 1120. See *Commissioner v. Roosevelt & Son Investment Fund*, supra; *Lee H. Marshall Heirs*, 39 B. T. A. 101. The

Commissioner took the position that certain of these entities should be taxed as associations instead of as trusts.

This Court in 1935 in the cases of *Morrissey v. Commissioner*, 296 U. S. 344, *Swanson v. Commissioner*, 296 U. S. 362, *Helvering v. Combs*, 296 U. S. 365, and *Helvering v. Coleman-Gilbert Associates*, 296 U. S. 369, established certain principles by which to determine whether an entity is a trust or an association for income tax purposes.

The provisions in Sections 275(a) and 275(c) of the Revenue Act of 1932 were first included in the revenue statutes as Sections 277(a) (1) and 277(a) (5) respectively of the Revenue Act of 1926, c. 27, 44 Stat. 58. The original wording of Section 277(a) (5) has been retained in the corresponding Sections in all the subsequent revenue acts. The original wording of Section 277(a) (1) has been retained in the corresponding Sections in all the subsequent revenue acts except that the time of the period of limitations has varied. This does not, however, affect the construction of the word "return."

The construction of these Sections and the intention of Congress in enacting them has never been presented to this Court.

The petitioner asks this Court to issue its writ of certiorari to the Circuit Court of Appeals, and after a review of the case to reverse the decree of that Court and to affirm the decision of the Board of Tax Appeals.

Respectfully submitted,

SHIPPEN LEWIS,

HAROLD EVANS,

Philadelphia, Pa.

PAUL F. MYERS,

Washington, D. C.,

Counsel for Petitioner.

APPENDIX.

VENUE.

Revenue Act of 1934; c. 277, 48 Stat. 760:

SEC. 519. VENUE FOR APPEALS FROM BOARD OF TAX APPEALS.

(a) Section 1002 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 1002. (a) Except as provided in subdivision (b), such decision may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia.

"(b) Notwithstanding the provisions of subsection (a), such decision may be reviewed by any Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

(c) Section 1002 of the Revenue Act of 1926, as amended by this section, shall be applicable to all decisions of the Board rendered on or after the date of the enactment of this Act, and such section, as in force prior to its amendment by this section, shall be applicable to such decisions rendered prior thereto, except that subdivision (b) thereof may be applied to any such decision rendered prior thereto (U. S. C., Title 26, Sec. 641).

STATUTE OF LIMITATIONS

Revenue Act of 1932, c. 209, 47 Stat. 237, Sec. 275(a);
Revenue Act of 1928, c. 852, 45 Stat. 856, Sec. 275(a):

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT
AND COLLECTION.

Except as provided in section 276—

(a) GENERAL RULE.—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Revenue Act of 1932, c. 209, 47 Stat. 237, Sec. 275(c);
Revenue Act of 1928, c. 852, 45 Stat. 856, Sec. 275(c);
Revenue Act of 1926, c. 27, 44 Stat. 58, Sec. 277(a) (5):

(c) CORPORATION AND SHAREHOLDER.—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed.

Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 142:

SECTION 142. FIDUCIARY RETURNS.

(a) Requirement of return.—Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof

and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of \$1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of \$2,500 or over, if married and living with husband or wife;

(3) Every individual having a gross income for the taxable year of \$5,000 or over, regardless of the amount of his net income;

(4) Every estate or trust the net income of which for the taxable year is \$1,000 or over;

(5) Every estate or trust the gross income of which for the taxable year is \$5,000 or over, regardless of the amount of the net income; and

(6) Every estate or trust of which any beneficiary is a non-resident alien.

Revenue Act of 1926, c. 27, 44 Stat. 58:

Sec. 277. (a) (1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

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IN THE

Supreme Court of the United States

October Term, 1939.

No. 462.

**GERMANTOWN TRUST COMPANY, Trustee of the
Germantown Trust Company Bond Investment Fund,**

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**Brief on Behalf of Petitioner Sur Writ of
Certiorari Granted November 13, 1939.**

HAROLD EVANS,

✓ **PAUL F. MYERS,**

Counsel for Petitioner.

✓ **MARTIN W. MEYER,**

JOSEPH RHODES,

Of Counsel.

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IN THE
Supreme Court of the United States.

No. 462. October Term, 1939.

**GERMANTOWN TRUST COMPANY, TRUSTEE OF THE
GERMANTOWN TRUST COMPANY BOND INVESTMENT
FUND,**

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**BRIEF ON BEHALF OF PETITIONER SUR WRIT OF
CERTIORARI GRANTED NOVEMBER 13, 1939.**

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is printed in the Record at pp. 48 to 53, inclusive, and has been reported in 106 Federal Reporter (2d Series) 139.

The memorandum opinion of the Board of Tax Appeals is printed in the Record, pp. 16 to 17, inclusive. It is not reported in the official reports of the Board.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240.(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28 U. S. C. A. Section 347.

The judgment of the Circuit Court of Appeals was entered on July 14, 1939 (R. 53).

On October 13, 1939, taxpayer filed with your Honorable Court a petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, which petition was granted by your Honorable Court on November 13, 1939.

STATEMENT OF QUESTIONS PRESENTED.

1. Whether the "Fiduciary Return of Income" on Treasury Form 1041 was "the return" specified in Section 275(a) of the Revenue Act of 1932 so that the assessment and collection of the proposed tax deficiency was barred two years after the filing of the return.

2. Whether a "Fiduciary Return of Income" on Treasury Form 1041 can be a "return" that decides the venue on the appeal under Section 1002 (a) of the Revenue Act of 1926 as amended, and not be the "return" that starts the running of the period of limitations under Section 275 (a) of the Revenue Act of 1932. Does the word "return" have a different meaning in these two Sections?

3. Whether venue to review the decision of the Board of Tax Appeals was in the Circuit Court of Appeals for the Third Circuit or in the Court of Appeals for the District of Columbia; that is, was the "Fiduciary Return of Income" on Treasury Form 1041 "the return of the tax in respect of which the liability arises" or "no return" under Section 1002 (a) of the Revenue Act of 1926 as amended.

STATUTES INVOLVED.

The power of the Commissioner to assess a deficiency in petitioner's 1932 federal income tax involves Sections 275 (a), 275 (c), and 276 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 237.

The question of venue to review the decision of the Board of Tax Appeals involves Section 1002 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 110, as amended by Section 519, Act of 1934, c. 277, 48 Stat. 760 (26 U. S. C. A. 641 b).

These statutes and other relevant statutes and regulations are set forth in the appendix hereto at pages 33-39.

STATEMENT OF THE CASE.

The petitioner is Germantown Trust Company, Trustee of the Germantown Trust Company Bond Investment Fund.

Germantown Trust Company is a trust company organized and existing under the laws of the State of Pennsylvania. It conducts a trust business involving the handling of all forms of trust estates and also acts as agent for various individuals and corporations in the custody, handling, and management of their investments. In order to afford persons for whom the Company held securities as agent or trustee the advantage of investing funds in diversified high grade bonds without delay and undue expense and under conditions which would permit of ready liquidation of the investments, the Company by agreement dated April 1, 1930 (R. 36), formed The Germantown Trust Company Bond Investment Fund (R. 29-30) and thereafter operated it according to the terms of the agreement (R. 31).

The facts in regard to the establishment and operation of this Fund were covered by stipulation before the Board of Tax Appeals (R. 29-43), and the Board adopted such facts as its Findings of Fact (R. 16).

The Company, as trustee, filed for the Fund "Fiduciary Returns of Income" on Treasury Form 1041 (furnished for

Statement of the Case

use by trustees) for the years 1930 and 1931. Respondent accepted these returns, and the Fund was taxed for these years as a trust, and not as a corporation.

On March 15, 1933, the Company, as trustee, filed for the Fund a "Fiduciary Return of Income" on Treasury Form 1041 for the calendar year 1932 with the Collector of Internal Revenue of the First District of Pennsylvania at Philadelphia (R. 35, 53 A-53 B). This return fully set forth the gross income, deductions and net income necessary to the calculation of the tax, if any, which might be due. Petitioner did not file a "Corporation Income Tax Return" on Treasury Form 1120 (R. 35). On September 17, 1936 Respondent prepared from the Form 1041 filed a so-called "Substitute Return" for Petitioner on Treasury Form 1120 for 1932 (R. 35, 53 C).

The individual participants in the Fund who were required to make federal individual income tax returns for 1932 included in their respective returns, filed on or before March 15 1933, their shares of the income disclosed on the schedule attached to the fiduciary return of income (R. 35, 36). The first notice Petitioner had of Respondent's change of position was the recommendation on or about July 8, 1936, of an internal revenue agent that the Fund be taxed as a corporation (R. 36). At that time it was too late for the individual beneficiaries of the fund to file claims for refund of the taxes they had paid.

Respondent on February 27, 1937, mailed a notice of a deficiency to Petitioner claiming that Petitioner was an association taxable as a corporation instead of a trust, for the year 1932 (R. 8, 36). This notice was mailed to Petitioner more than two years after the return on Form 1041 was filed by it, but less than four years after March 15,

1933, the last date on which any participant in the Fund filed his 1932 individual return for the purposes of this case (R. 35, 36).

On May 22, 1937, Petitioner filed a petition with the United States Board of Tax Appeals for a redetermination of this deficiency (R. 4-7), asserting (1) it was taxable as a trust and not as an association, and (2) the two year statute of limitations from the time the return was filed had run against the assessment and collection of the deficiency under Section 275 (a) of the Revenue Act of 1932 (R. 4, 5). On August 26, 1938, the Board of Tax Appeals, as set forth in its memorandum opinion entered August 24, 1938, ordered and decided (R. 18) that there was no deficiency because the statute of limitations in Section 275 (a) applied and the limitation had run (R. 17). As this disposed of the case, the Board did not discuss or decide the other issue (R. 16).

The Commissioner appealed to the Circuit Court of Appeals for the Third Circuit (R. 19-23) and to the Circuit Court of Appeals for the District of Columbia (R. 2, 3). The case first came before the Third Circuit Court of Appeals. It was argued April 13, 1939, before Honorable John Biggs, Jr., Honorable William Clark, Honorable Francis Biddle, Circuit Judges (R. 48), and on July 14, 1939, an opinion was filed by Honorable Francis Biddle, which decided (1) that a return had been filed under Section 1002 (a) of the Revenue Act of 1926, as amended (26 U. S. C. A. 641), and that therefore the Court had jurisdiction, but (2) reversing the Board's decision on the statute of limitations, held that "no return" had been filed under Section 275 (c) of the Revenue Act of 1932 and that therefore the four year limitation applied rather than the two year limi-

tation under Section 275 (a). The Court remanded the record to the Board, directing it to determine the Petitioner's appeal on the merits (R. 48-53).

On October 13, 1939, Petitioner filed with your Honorable Court a petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, which petition was granted by your Honorable Court on November 13, 1939.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in holding and deciding that the "Fiduciary Return of Income" on Treasury Form 1041 was not "the return" specified in Section 275 (a) of the Revenue Act of 1932 and therefore that the assessment and collection of the proposed tax deficiency was not barred by the two year period of limitation therein.

2. The Circuit Court of Appeals erred in holding and deciding that the "Fiduciary Return of Income" on Treasury Form 1041 was "no return of the tax imposed by this title" and therefore that Section 275 (c) of the Revenue Act of 1932 applied.

3. The Circuit Court of Appeals erred in not holding and deciding that the word "return" and the phrase "return of the tax" in the limitation sections of the Revenue Act (Sections 275 (a) and 275 (c) of the Revenue Act of 1932) do not carry the same meaning as the phrase "return of the tax" in the venue section of the Act (Revenue Act of 1934, Section 519, amending Section 1002 (a) of the Revenue Act of 1926).

4. The Circuit Court of Appeals erred in holding and deciding that the "Fiduciary Return of Income" on Treasury Form 1041 was the "return of the tax" that gave the

Circuit Court of Appeals venue on the appeal under Section 1002 (a) of the Revenue Act of 1926 as amended, but was not a "return" that starts the running of the period of limitations specified in Section 275 (a) of the Revenue Act of 1932.

5. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

6. The Circuit Court of Appeals erred in entering the following judgment:

"the order or decree of the said Board of Tax Appeals in this cause be and the same is hereby reversed, and the cause remanded to the said Board of Tax Appeals with direction to determine the taxpayer's appeal on the merits."

SUMMARY OF ARGUMENT.

1. The "Fiduciary Return of Income" filed by Petitioner in good faith on Treasury Form 1041 and containing all the information necessary for the calculation of any tax that might be due was a "return" within the meaning of Section 275 (a) of the Revenue Act of 1932, fixing a two year period of limitation, and the assessment of the proposed deficiency is therefore barred.

2. The four year limitation provided in Section 275 (c) of the Act does not apply where, as in this case, a return is filed in good faith containing all essential information.

3. Section 275 (c) applies only where the taxpayer files no return within the meaning of Section 276 (a).

4. The filing in good faith of the Fiduciary Return on Form 1041 disclosing all necessary information takes this case out of the "no return" classification of Section 276 (a).

5. The Fiduciary Return contained all the information which would have been included by Petitioner in a corporation return on Form 1120. Respondent used this return as the basis for the proposed assessment of the tax, and cannot now claim that it was not a "return of the tax."

6. If this assessment is allowed, the individual participants in this Fund who paid their income taxes on their gross distributive shares of the Fund's income will be doubly taxed, as it was too late for them to file claims for refund when Petitioner in July, 1936, first knew that Respondent might tax it as a corporation.

7. The word "return" has the same meaning in the limitation sections of the Revenue Act as it has in the venue section. If the fiduciary return is the "return" that gave the Circuit Court of Appeals jurisdiction of the appeal from the Board of Tax Appeals under Section 1002 (a) of the Revenue Act of 1926 as amended, it is the "return" that starts the running of the period of limitations under Section 275 (a). The Circuit Court of Appeals for the Second Circuit was correct in so holding in a similar case, and the lower Court erred in holding otherwise in this case.

8. The lower Court in this case correctly held that it had jurisdiction.

ARGUMENT.**I. The Assessment of the Proposed Deficiency Is Barred by the Statute of Limitations.**

Petitioner, Germantown Trust Company, as Trustee of the Germantown Trust Company Bond Investment Fund filed in good faith a fiduciary return on Form 1041 for the year 1932 on March 15, 1933 (R. 35). Respondent used that return as the basis of his audit and as a basis for his ninety-day letter (R. 10). In such return Petitioner entered its gross income and deductions disclosing fully all items thereof and computing its net income. From this return Respondent prepared a return on Form 1120 which he designated a "substitute return" and noted that "orig. filed on 1041." (See Exhibit D of the Stipulation of Facts and page 1 of Exhibit E of said Stipulation of Facts (R. 53 A-C)). The statutory notice of deficiency was not issued until February 27, 1937 (R. 8, 36). The two-year limitation period provided in Section 275 (a) of the Revenue Act of 1932 expired on March 15, 1935. Petitioner therefore contends that Respondent is barred from assessing and collecting this tax.

Section 275 of the Revenue Act of 1932 (c. 209, 47 Stat. 237) provides:

"SECTION 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

"Except as provided in section 276—

(a) General rule.—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(c) Corporation and shareholder.—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed."

Section 276 of the Act provides:

"SECTION 276. SAME—EXCEPTIONS.

"(a) False return or no return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

A. The Fiduciary Return Was a Return Within the Meaning of Section 275 (a).

Petitioner contends that the fiduciary return filed by it in good faith on Form 1041 was a "return" within the meaning of Section 275 (a) fixing a two year period of limitation. The Board of Tax Appeals concurred in this view (R. 16-17).

Respondent contends that the fiduciary return was "no return of the tax" and that the case therefore falls within Section 275 (c). The Circuit Court of Appeals for the Third Circuit concurred in this view (R. 50-52).

The Circuit Court of Appeals first reached the conclusion that the fiduciary return filed by Petitioner was a "return of the tax" under the venue section of the Revenue Act (Section 1002 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 110, as amended by the Act of 1934, c. 277, 48 Stat. 760 (26 U. S. C. A. 641 b) and that therefore it had jurisdiction to review the decision of the Board of Tax Appeals (R. 49)). It then concluded that there was "no return of

the tax" under the limitation sections of the Act. In so doing it explicitly took issue with the decision of the Circuit Court of Appeals for the Second Circuit to the effect that the "return of the tax" must carry the same meaning in the limitation sections as in the venue section of the Act. (*Commissioner v. Roosevelt & Son Investment Fund*, 89 Fed. (2d) 706). We shall discuss this question later in our brief (p. 26).

The Circuit Court of Appeals was led to the conclusion that the fiduciary return filed by Petitioner was no return of the tax under the limitation sections of the Act, by two misconceptions: (1) that the legislative history of Section 275 (c) shows that the purpose of the Congress in enacting Section 275 (c) was to give the Commissioner a longer period in which to file assessments in the cases therein provided for than in cases covered by Section 275 (a), and (2) that the only conceivable purpose of Section 275 (c) was to care for the exact situation here presented.

We submit that both of the premises, which led the Court to its conclusion in regard to the period of limitation, are unsound.

B. Section 275 (c) Is Applicable Only Where the Case Would Fall in the "No Return" Classification Covered by Section 276. (a) Were It Not for the Fact That the Participants Have Included Their Shares of the Income in Their Individual Returns.

(1) The Legislative History of Section 275 (c).

Provisions similar to those incorporated in Section 275 (c) of the 1932 Act were first included in the Revenue Act of 1926 and there appeared as Section 277 (a) (5) c. 27, 44 Stat. 58.

Prior to that time if individuals engaging in a joint venture, either in the form of a trust or otherwise, believing the income thereof was taxable to them as individuals, included their respective shares of the income in their individual returns but filed no corporation, partnership, or fiduciary return, and it was thereafter determined that they were taxable as a corporation, there was no limitation period within which the tax must be assessed. It was a "no return" case in which the tax might be assessed at any time under Section 278. (a) of the Revenue Act of 1924, c. 234, 43 Stat. 299 (which corresponds with Section 276 (a) of the Act of 1932).

To provide a limitation in such cases Section 277 (a) (4) was introduced in the Revenue Bill of 1926. This section provided for a four year period of limitation commencing at the last date on which any of the individual shareholders filed his return. This section became Section 277 (a) (5) in the Revenue Act of 1926 and Section 275 (c) of the 1932 Act.

With respect to this Section (277 (a) (4) in the Bill) the House Ways and Means Committee in House Report No. 1, 69th Congress, first session, page 11, states as follows:

"This section provides that if a corporation makes no return of the tax imposed by this bill, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed. This provision is limited to taxes imposed under this bill, and it is incorporated in the bill to make certain that if in the future the beneficiaries of a trust or the members of an association include their distributive share in their income-tax return, and

if at a later date it should be held that the trust or association is subject to the corporation tax and should have made the return, the statute of limitations as applied to the trust or association shall run from the dates above specified."

The Report of the Senate Committee on Finance with respect to the Revenue bill of 1926 contained an identical statement. Senate Report No. 52, 69th Congress, first session, page 28. The language indicates that the only purpose of this Section was to provide that if the trust or association did not make the return, but if the shareholders or beneficiaries did include the income in their returns, the statute of limitations as applied to the trust or association should run from the last date on which any shareholder's return was filed. Omitting the qualifying words the purpose is clearly expressed in the following:

"... it is incorporated in the bill to make certain that ... the statute of limitations as applied to the trust or association shall run from the dates above specified."

Respondent argued in the Circuit Court of Appeals that the language above quoted from the reports of the Ways and Means Committee of the House of Representatives and of the Senate Finance Committee showed that the intention of the Congress in inserting Section 277 (a) (4) in the Revenue Bill of 1926 was to give Respondent a longer period for assessing the tax against the trust or association than that applicable to taxpayers generally.

The Circuit Court of Appeals adopted this line of reasoning. After quoting the above portion of the report the Court states

"It was natural that the Commissioner should be given a longer period for assesment,"

(i. e. longer than the three year period provided in the usual case by Section 277 (a) (1) of the 1926 Act as finally enacted).

This consideration might have some weight if, and only if, at the time the reports were made the limitation period in the usual case had been less than four years. But such was not the case.

An examination of the Revenue bill of 1926 as introduced in the House of Representatives by the Ways and Means Committee shows that the regular statute of limitations for assessments as therein provided in Section 277 (a) (1) was four years after the return was filed. (*Paul & Mertens, Law of Federal Income Taxation*, Vol. 5, p. 532-3; *Seidman, Legislative History of Federal Income Tax Laws*, p. 627.) The Senate Finance Committee made certain amendments to this bill but left the four-year period of limitation contained in Section 277 (a) (1) unchanged.

Nothing therefore in the Committee reports can properly be construed as showing an intention to give the Commissioner a longer period to assess the tax in a case covered by Section 277 (a) (4) of the bill than in the usual case covered by Section 277 (a) (1) because at the times the Committee reports were submitted the limitation in both cases was four years. It was the evident intent of both Committees that in the usual case where a return was filed by an individual, corporation, trust or association, the statute of limitations would start to run from the filing of such return. But in cases where a trust, association, partnership or joint venture filed no return, the regular statutory period of limitations should start to run from the date on which the last shareholder's return was filed. This Section, 277 (a) (4), (Section 275 (c) of the 1932 Act) was to take the case out of the ordinary no-return category. It was not intended to

broaden Section 277 (a) (1), (Section 275 (a) of the 1932 Act) but was intended to limit and restrict Section 278 (a) (Section 276 (a) of the 1932 Act).

At some time during the consideration of the 1926 Revenue Act, the general statutory period of limitations contained in Section 277 (a) (1) was changed from four years to three years. It does not appear when this change was made but apparently it was made from the floor of the Senate and the conference reports on the Revenue bill of 1926 indicate that the House of Representatives yielded to the Senate on this change. (*Seidman, Legislative History of Federal Income Tax Laws*, p. 627). It is true that the period of limitations in Section 277 (a) (4) was left at four years but this does not change the fact that the original intent of the Congress was that this Section was to be a limitation or a restriction on the no-return section.

This intention of the Congress was shown again when the Subcommittee of the House Ways and Means Committee recommended that Section 275 (c) of the Revenue Act of 1932 should be eliminated from the Revenue Act of 1934. Their report, 73rd Congress, second session, House Report, December 4, 1933, p. 21, stated:

"Subsection (c) of this section provides that if a corporation fails to file a return but each shareholder includes in his return his distributive share of the net income of the corporation, then the corporate tax may be assessed within 4 years after the last date on which the shareholder's return was filed. Under the general rule, if a corporation fails to file a return, the corporate tax may be assessed at any time. Your subcommittee sees no reason for making an exception to the general rule merely because some of the shareholders have included corporate income in their returns. It is accordingly recommended that subsection (c) be eliminated."

The Treasury Department objected to the Subcommittee's proposal. Mr. Roswell Magill stated the recommendation of the Treasury Department at the Hearings before the Committee on Ways and Means of the House of Representatives, 73rd Congress, first session, p. 146, as follows:

“(26) Statute of limitations—assessments—(second recommendation).—The Treasury believes that Section 275 (c) should not be eliminated. It serves a useful purpose, in that it contains a period of limitation upon the assessment of corporate taxes, and it accords with the general policy that a definite point of repose for all tax cases is desirable.”

We therefore submit that the legislative history of Section 275 (c) shows that its purpose was not, as the Circuit Court of Appeals assumed, to give the Commissioner a longer period for assessment than in the usual case provided for in Section 275 (a). The purpose clearly is shown to have been to provide a period of limitation where the members of a group, believing themselves to be a partnership or joint venture have in good faith included its income in their individual returns but have filed no partnership, fiduciary or corporation return.

(2). Section 275 (c) Is Not Applicable to Cases Where a Return Giving the Essential Information Is Filed in Good Faith.

The Circuit Court of Appeals held that the only conceivable purpose of Section 275 (c) was to care for the exact situation here presented. The Court said:

“It is difficult to conceive, therefore, how Section (c) could apply except where a fiduciary return is made, as in this case, by the entity, imagining itself to be a fiduciary, but perhaps later determined to be a corpora-

tion. The section must be meant to apply to a case where this entity fails to make a corporation return but makes only a fiduciary return." (R. 51.)

We respectfully submit that the Court here fell into error (a) by ignoring the words of the Section showing plainly that it applies only where "no return of the tax" has been filed and (b) in assuming that the only entities or groups to which it could apply are corporations and trusts with large numbers of stockholders or beneficiaries.

The Court holds that:

"This section of course does not apply where a corporation makes no return and its shareholders include its dividends in their return. It looks to a case only where the corporation makes no return and each of its shareholders includes 'his distributive share of the net income.' Shareholders do not ordinarily include 'distributive shares'; ordinarily they return dividends. When, however, they believe that the entity is not a corporation but a fiduciary, liable only to file a fiduciary return, there are no dividends, and they return their distributive shares, as shown by the fiduciary return. It is hard to imagine their returning such distributive shares without the fiduciary return, from which they obtain the necessary information." (R. 50-51.)

If as the Court assumes, Section 275 (c) applies only to cases where a fiduciary return is filed as in this case, the question immediately arises why the Congress did not plainly say so? And, furthermore, if the section is to apply only in cases where fiduciary returns are filed, why should not the limitation period commence at the date of filing the fiduciary return instead of at the last date on which any shareholder's return is filed?

Or why is it hard to imagine beneficiaries returning their distributive shares without a fiduciary return from which they obtain the necessary information? There are many trusts for family or other closely associated groups where such information is known to all the beneficiaries without any fiduciary or partnership return being prepared.

Or again, why should the Court assume that Section 275 (c) applies only to trusts? Surely it applies to joint ventures, partnerships and associations of all kinds which the Commissioner ultimately may determine to be taxable as corporations but for which no return has been filed for the group because the individuals composing it believed in good faith that the income was taxable to them as individuals.

It is submitted therefore that there is every reason to construe Section 275 (c) to apply, as its language plainly indicates, only to those cases where no return is filed by or on behalf of the entity ultimately found to be taxable as a corporation.

A consideration of the application of Section 275 (c) to other facts and circumstances makes the foregoing conclusion inescapable. Suppose in the present case one or more of the shareholders had not included his distributive share of the net income in his return. Then obviously the conditions of Section 275 (c) would not be met and the period of limitation provided in that Section would not be applicable. In such a case would Respondent contend that the case came within the provisions of Section 276 (a) giving him an unlimited time for making the assessment or would he contend that Section 275 (a) providing for a two-year period of limitation would be applicable? If it is contended that under such circumstances the two-year period limitation is applicable then a shareholder can, by failing

to do what he is supposed to do, shorten the statutory period of limitation as compared with the case where every shareholder includes in his return his distributive share of the income. It is indeed strange justice which would permit such a conclusion. On the other hand, if the failure by a shareholder to include his distributive share of the net income in his return brings the case within Section 276 (a) then we have the precise conclusion for which Petitioner contends, namely, that Respondent must first establish that the case is a no-return case within Section 276 (a) before Section 275 (c) can be applicable. It is then clear that the purpose of Section 275 (c) was to fix a point of beginning for the running of the statute of limitations in a case where otherwise under Section 276 (a) there would be no bar to the assessment and collection of a tax at any time.

C. The Filing of a Fiduciary Return on Form 1041 Takes This Case Out of the No-Return Classification.

We are then brought to the question whether the present case would be a no-return case within Section 276 (a), were it not for the fact that each of the beneficiaries required to make an income tax return did include in his return his distributive share of the net income (R. 35).

Complete accuracy is not necessary to rescue a return from nullity.

In *Zellerbach Paper Company v. Helvering*, 293 U. S. 172, 180, the Court speaking through Mr. Justice Cardozo stated:

“Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such . . . and evinces an honest and genuine endeavor to satisfy the law. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary.”

The filing of a return in good faith disclosing all items of gross income and deductions and computing a net income starts the running of the statute of limitations. An error in selecting the correct blank upon which to disclose such information does not deprive a taxpayer of the benefits of the statute of limitations.

The principle applicable to such situations was first enunciated by the Board of Tax Appeals in the early case of *Mabel Elevator Company*, 2 B. T. A. 517. In that case the Board held that a return, purported to be made in accordance with law, prepared on the fiscal year basis while it should have been made on a calendar year basis, started the running of the statutory period of limitations.

This case was followed by *Abraham Werbelovsky, Executor*, 8 B. T. A. 442, 446. There the Board held that the filing of a return by the executor on Form 1041 instead of on Form 1040 or Form 1040A started the running of the statute of limitations. In that case the Board observed:

“Does the fact that the executor . . . in filing ‘a return of the income’ used Form 1041 instead of either Form 1040 or 1040A place the estate in the position of having failed to file a return within the meaning of the words ‘or of a failure to file a return’ as used in Section 278 (a) of the Revenue Act of 1924? We think not. The estate did file ‘a return.’ ”

This decision was followed by the Board in *Estate of F. M. Stearns*, 16 B. T. A. 889, and *J. R. Brewer, Administrator*, 17 B. T. A. 704.

The Third Circuit Court of Appeals in the case of *Commissioner v. Stetson & Ellison Company*, 43 Fed. (2d) 553, came to the conclusion that a consolidated income tax return filed in good faith and substantially complying with the statute started the running of the statute of limitations

for assessment of additional taxes against all of the consolidated companies even though one of them was not in fact a part of the consolidation. The court found that the returns were filed in good faith and in substantial compliance with the requirement of the statute.

The return here in controversy was likewise filed in good faith and in substantial compliance with the statute. It disclosed all the necessary facts for the assessment of a tax and put Respondent on notice with respect to the position taken by Petitioner on the question of its liability for income taxes.

In the case of *United States v. Tillinghast*, 69 Fed. (2d) 718, the Circuit Court of Appeals for the First Circuit came to the conclusion that where an income tax return showed no profits the failure to file a supplementary return under the excess profits tax was not a failure to file a required return within the statute. In that case some of the previous cases are referred to and the opinion makes clear the distinction that should be made between cases where there is no return at all or where it is so incomplete that a tax cannot be assessed and cases where returns are made in good faith disclosing all of the necessary information.

The precise question here in issue was before the Board of Tax Appeals in *Roosevelt & Son Investment Fund*, 34 B. T. A. 38. In a careful opinion in which the Board reviewed its previous decisions it was held that the period of limitations prescribed in Section 275 (a) is applicable where a return on Form 1041 is filed and that Section 275 (c) is not applicable.

When the Board of Tax Appeals had the instant case before it, it followed its opinion in the Roosevelt case, *supra*, notwithstanding the fact that the Circuit Court of Appeals for the Second Circuit had dismissed for lack of jurisdic-

tion; the Commissioner's petition for review of the Roosevelt decision. Subsequently in the case of *Lee H. Marshall Heirs v. Commissioner*, 39 B. T. A. 101, the Board came to a different conclusion, namely, that Section 275 (c) of the Revenue Act of 1932 was applicable. The Board, however, reached that conclusion because of the dictum contained in the opinion of the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner v. Roosevelt & Son Investment Fund*, 89 F. (2d) 706. That dictum was based upon the construction which the Circuit Court of Appeals for the Second Circuit put upon the phrase "the return of the tax" as used in Section 519 of the Revenue Act of 1934 amending Section 1002 (a) of the Revenue Act of 1926. With this construction, the Circuit Court of Appeals for the Third Circuit, Petitioner, and Respondent all disagree.

Even if it should ultimately be held that Petitioner was taxable as an association, it is doubtful whether it was required to file a return on Form 1120.

Section 142 of the 1932 Revenue Act (c. 209, 47 Stat. 214) provides:

"Requirement of return.—Every fiduciary . . . shall make under oath a return . . . for any of the following individuals, estates; or trusts for which he acts"

Petitioner in this case is a fiduciary. Respondent so admits (R. 4, 12). Under the provisions of Section 142 of the Revenue Act of 1932 and the Regulations of Respondent thereunder (Regulations 77, Article 741), it was required to make a return on Form 1041. Was it also required to make a return on Form 1120?

Section 52 of the Revenue Act of 1932 (c. 209, 47 Stat. 188) relates to the requirement of returns on the part of corporations. The material part thereof reads as follows:

“(a) Requirement—Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title . . .”

The statute does not prescribe the form of return to be used. Petitioner in filing a return on Form 1041 complied with this provision. It is true that the Regulations of Respondent require a return on Form 1120 “in the case of ordinary corporations” (Regulation 77, Article 391). But Petitioner is certainly not an “ordinary corporation,” Respondent merely asserts it was “operating as a corporation” (R. 10). Section 1111 (a) (2) of the 1932 Act (c. 209, 47 Stat. 289) states that the term “corporation” includes “associations, joint stock companies and insurance companies.” but nowhere is the term “ordinary corporation” defined. Even under Respondent’s own construction of the term “ordinary corporation” it does not include all of the entities covered by the statutory definition of corporation, because in Article 391 of Regulations 77, which prescribes the form of return for the ordinary corporation, insurance companies are excluded, whereas they are included in the statutory definition of a corporation.

Petitioner acted in perfect good faith and had ample reason to take the position that a filing of a return on Form 1041 was a full compliance with the law. It had no knowledge that it might be held taxable as a corporation until July, 1936 (R. 36), whereas the trust began on April 1, 1930 (R. 30). Certainly it cannot be contended that Petitioner to protect itself and to have the regular statutory period of limitations of Section 275 (a) apply should have filed both a return on Form 1041 and a corporation return on Form 1120.

When Petitioner in July, 1936, first knew that it might be taxable as a corporation, it was too late for the individual participants in the Fund, who had included their shares of the income in their individual federal income tax returns for 1932 (R. 35, 36), to file claims for refund. Section 322 (b) (1) of the Revenue Act of 1932 (c. 209, 47 Stat. 242) provides:

“Period of limitation.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.”

Under Sections 11 and 12 of the Revenue Act of 1932, c. 209, 47 Stat. 174, the participants paid normal tax and surtax on their gross distributive shares without any deduction of corporation income tax. If this Fund was a corporation, these distributions not only would be decreased by the amount of the corporate income tax but would be taxed as dividends and under Sections 11 and 25 (a) of the Revenue Act of 1932 (c. 209, 47 Stat. 174, 184) would not be subject to the normal tax but only to the surtax. It would be inequitable to allow the Commissioner four years to assess a deficiency against the Fund, which should entitle the participants to refunds of their individual taxes, and then point out to them that the time for filing claims for such refunds was two years from the time the tax was paid. The Act should not be construed so as to permit this result unless no other reasonable construction is possible.

The Stipulation of Facts clearly shows that Petitioner filed a “return” (Pars. 13, 14—R. 35). The so-called substitute return prepared by Respondent on Form 1120, bears the notice that it is a “substitute return” (R. 53C). The following legend appears thereon: “Orig. filed on 1041.” The substitute return discloses no more information than

the return prepared and filed by Petitioner, with the exception of the amount of the tax, computed as though it were a corporation. The gross income on that return is precisely the same as that on the fiduciary return filed. The deductions are the same with the exception of the minor adjustments set forth in Respondent's ninety day notice (R. 10). In fact this statutory notice which initiated this proceeding is based solely upon Petitioner's return on Form 1041. No reference is made in this letter to the so-called substitute return on Form 1120 or the fact that Respondent had prepared such a return (R. 10). 'Can it be seriously argued that a return which Respondent has used as the basis of a proposed assessment of tax is not a "return of the tax"?'

The only point of difference between the corporation return and the fiduciary return is the computation of the amount of corporation income tax. This difference cannot be determinative. Unquestionably, a large number of returns are filed annually on which no tax is computed and on which it is subsequently determined that a tax is due. Does Respondent take the position that in each of those cases there was not a "return of the tax"? Petitioner took the position that it need compute no tax because it owed no tax. It was and is the contention of Petitioner that it is taxable as a trust and not as a corporation. If it had filed a return on Form 1120, it would have disclosed precisely the same information it disclosed on the fiduciary return and would not have computed the corporation tax. This is the accepted practice of raising the issue of the taxability of the entity involved. If a tax is computed on the return, Respondent treats it as a self-assessment and the Collector may and does proceed to enforce the collection of the tax. In such cases the taxpayer is deprived of the right given by

statute to have its tax liability determined by the Board of Tax Appeals. This is precisely what happened in the case of *John A. Gebelein, Inc. v. Commissioner*, 37 B. T. A. 605, in which case the taxpayer computed a tax but claimed it was not subject to the tax. Certainly it was never the intention of Congress, nor should the law be construed to deprive a taxpayer of the right to petition the Board of Tax Appeals for redress.

If Petitioner had filed Form 1120 without computing the tax, clearly the two year limitation provided in Section 275 (a) would have applied. Surely the same result should follow if exactly the same information is included in Form 1041. The tax laws should not be treated as a game where the rights of the taxpayer depend on which card he draws. Substance, not mere form, should be the controlling factor.

Petitioner therefore submits that the fiduciary return filed by it in good faith was a "return" within the meaning of Section 275 (a) of the Revenue Act of 1932 and that the two year period of limitation therein provided bars the collection of the tax.

II. The Word "Return" Has the Same Meaning in Sections 275 (a) and 275 (c) of the Act Providing Limitations on Assessments as It Has in Section 1002 (a) as Amended Governing Venue on Appeals From the Board of Tax Appeals.

Section 519 of the Revenue Act of 1934, c. 277, 48 Stat. 760, provides:

"SEC. 519. VENUE FOR APPEALS FROM BOARD OF TAX APPEALS.

"(a) Section 1002 of the Revenue Act of 1926 is amended to read as follows:

“SEC. 1002. (a) Except as provided in subdivision (b), such decision may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia.”

The Circuit Court of Appeals for the Third Circuit in this case held that the words “return” and “return of the tax” did not have the same meaning in Section 1002 (a) as they did in Section 275 (a) and 275 (c). It concluded that there was a “return of the tax” within the meaning of Section 1002 (a).

This conflicts with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Roosevelt and Son Investment Fund*, 89 Fed. (2d) 706, involving practically identical facts, in which it was held that the words “return of the tax” have the same meaning in both sections.

In that case the Court stated:

“Thus the representation is made of jurisdiction by reason of the return filed by respondent on Form 1041. But if these representations be correct, the alleged deficiency is clearly barred by the limitation provisions of Section 275a. If the petitioner (Commissioner) concedes that a proper return was filed Section 275c of the statute becomes inapplicable for that section by its terms applies only where no return is made . . . It cannot be that there was a return for one purpose” (jurisdiction) “but not for another” (statute of limitations).

The Third Circuit Court in this case adopted the opposite view. They said:

"We are of course familiar with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Roosevelt & Son Inv. Fund*, 89 F (2d) 706, that it did not have jurisdiction, not passing on the other question, and dismissing the appeal. Similar facts were presented. The court thought that 'return of the tax' must carry the same meaning in the venue section as in the limitation sections. But courts have not felt it necessary to invoke such rigid consistency where different meanings were evidently intended for the same words. See *Helvering v. British American Tobacco Co.*, 69 F. (2d) 528, 530 (CCA 2d), affirmed 293 U. S. 95; *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 86-88. The context of words may affect their meanings. The kind of return required by classification for jurisdiction need not be the same as the return which will start a period of limitation." (R. 52)

Petitioner agrees with the reasoning of the Second Circuit Court. We fail to find anything in the Revenue Acts which indicates that the word "return" does not have the same meaning in Section 275 as in Section 1002 (a).

In *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 87, Mr. Justice Sutherland, speaking for this Court, said:

" 'there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.' *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433, 76 L. ed. 1204, 1207, 52 S. Ct. 607."

See also *Pampanga Sugar Mills v. Trinidad*, 279 U. S. 211, 218; *Butterworth et al. v. Commissioner*, 63 Fed. (2d) 944, 948 (C. C. A. 3rd), affirmed 290 U. S. 365.

It is true, of course, that this presumption may be rebutted, but Petitioner submits the Third Circuit Court has

not shown in its opinion any adequate reason showing that a different meaning was intended by the Congress for the words "return of the tax" used in Section 275 (c) than the Congress intended when using these words in Section 1002 (a) as amended.

While we agree with the Second Circuit Court that the words "return" and "return of the tax" have the same meaning in Section 275 as they have in Section 1002 (a) as amended, we disagree with that Court in holding that a fiduciary return is not a return under Section 1002 (a). In this we are in accord with Respondent and with the Third Circuit Court.

This brings us to the question of the jurisdiction of the lower Court.

III: Venue of Appeals From the Board of Tax Appeals.

The Circuit Court of Appeals held that the fiduciary return filed by Petitioner in the Collector's Office in Philadelphia was "the return of the tax in respect of which the liability arises" within the meaning of Section 1002 (a), *supra*, page 27, and that therefore it had jurisdiction.

The Court stated:

"We can find no basis for distinguishing between a fiduciary return and a corporation income tax return, so far as jurisdiction is concerned. Both are tax returns, though one may be accompanied by payment, and both involve a definite act on which jurisdiction may be hung. Both are returns 'of the tax in respect of which (fol. 51) the liability arises.' If the Fund is taxable the tax is based on the information shown in the Fiduciary Return. It is spoken of as a 'return' by Sec. 142 of the

Act: Requirement of return.—Every fiduciary . . . shall make under oath a return . . . for any of the following individuals, estates, or trusts for which he acts The distinction becomes irrational for this purpose. It is only when no act is performed by the taxpayer, no return of any kind made, that it becomes necessary to set up jurisdiction elsewhere.” (R. 49-50)

A similar question of jurisdiction was involved in *Commissioner v. Roosevelt and Son Investment Fund* (89 Fed. (2d) 706). In that case the Circuit Court of Appeals for the Second Circuit held that it did not have jurisdiction. There is therefore direct conflict between the courts of the Second and Third Circuit on this question, and it is important that this question be settled.

In the *Roosevelt* case, as here, the taxpayer filed a fiduciary return on Form 1041. More than two years after the fiduciary return was filed but less than four years after the individual returns of the participants were filed, the Commissioner assessed a tax against the fund as a corporation. The Board of Tax Appeals (34 B. T. A. 38) held that the assessment was barred by Section 275 (a) of the Revenue Act of 1928, which is identical with section 275 (a) of the 1932 Act. The Commissioner appealed to the Circuit Court of Appeals for the Second Circuit on the same ground as here, viz., that the fiduciary return was not a return within the meaning of Section 275 (a). The Second Circuit Court stated that “return of the tax” meant the same thing in both the limitations sections and the venue section of the act and that if the Commissioner was right in his contention that the fiduciary return was a return within the meaning of Section 1002 (a), it was also a return within the meaning of Section 275 (a). The Court held that there

was no return under Section 1002 (a) and dismissed the appeal for want of jurisdiction.

This conflict between the two circuits should be resolved so that there may be no question as to jurisdiction of appeals from the Board of Tax Appeals in cases such as the present.

Petitioner submits that on the question of jurisdiction the Circuit Court of Appeals for the Third Circuit is correct and that a fiduciary return should be held to be a "return of the tax in respect of which the liability arises" within the meaning of Section 1002 (a) of the Revenue Act of 1926 as amended by Section 519 of the Act of 1934. We understand that Respondent concurs in this view.

CONCLUSION.

There is no question but that Petitioner in this case filed in good faith the return which it believed was proper, viz., a fiduciary return on Form 1041, that this return disclosed all of the information which would have been disclosed had it filed a return on Form 1120 and all the information which was necessary to enable Respondent to assess the proper tax against it.

To hold that this was a "return of the tax" which gave the lower court jurisdiction but not a "return" which started the two year period of limitations is to draw a distinction without a difference. The words have the same meaning in both sections. The fiduciary return was a return both for the purpose of giving the lower court jurisdiction under Section 1002 (a) and for the purpose of starting the two year period of limitations provided for in Section 275 (a).

Argument

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment originally entered by the Board of Tax Appeals affirmed.

Respectfully submitted,

HAROLD EVANS,

PAUL F. MYERS,

Counsel for Petitioner.

MARTIN W. MEYER,

JOSEPH R. BROADS,

Of Counsel.

APPENDIX.

STATUTES INVOLVED.

STATUTE OF LIMITATIONS.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 1. APPLICATION OF TITLE.

The provisions of this title shall apply only to the taxable year 1932 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1932 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Title IX of this Act or by legislation enacted subsequent to this Act.

Section 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following:

(a) 4 per centum of the first \$4,000 of the amount of the net income in excess of the credits against net income provided in Section 25; and

(b) 8 per centum of the remainder of such excess amount.

Section 12. SURTAX ON INDIVIDUALS—RATES OF SURTAX.

(a) There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax . . .

Section 25. CREDITS OF INDIVIDUAL AGAINST NET INCOME.

There shall be allowed for the purpose of the normal tax, but not for the surtax, the following credits against the net income:

(a) Dividends.—The amount received as dividends—

(1) from a domestic corporation which is subject to taxation under this title.

Section 52. CORPORATION RETURNS.

(a) Requirement. Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice-president, or other principal officer and by the treasurer or assistant treasurer . . .

Section 142. FIDUCIARY RETURNS.

(a) Requirement of return.—Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of \$1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of \$2,500 or over, if married and living with husband or wife;

(3) Every individual having a gross income for the taxable year of \$5,000 or over, regardless of the amount of his net income;

(4) Every estate or trust the net income of which for the taxable year is \$1,000 or over;

(5) Every estate or trust the gross income of which for the taxable year is \$5,000 or over, regardless of the amount of the net income; and

(6) Every estate or trust of which any beneficiary is a non-resident alien.

Section 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) General rule.—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(c) Corporation and shareholder.—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed.

Section 276. SAME—EXCEPTIONS.

(a) False return or no return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Section 322. REFUNDS AND CREDITS.

(b) Limitation on allowance.

(1) Period of limitation.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) Limit on amount of credit or refund.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

Section 1111. DEFINITION.

(a) When used in this Act . . .

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

Revenue Act of 1926, c. 27, 44 Stat. 58:

Section 277. (a) except as provided in Section 278.

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(5) If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed. Nothing in section

283 shall be construed as making the provisions of this paragraph applicable to any tax imposed by a prior Act of Congress.

Section 278.

(a). In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. (Section 278 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 299 is the same.)

Calendar No. 54 H. R. 1, 69th Congress, 1st Session, Report No. 52, In the Senate of the United States, An Act to reduce and equalize taxation, to provide revenue, and for other purposes.

Section 277. (a) Except as provided in section 278.

(1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, and by this Act, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(4) If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed. Nothing in section 283 shall be construed as making the provisions of this paragraph applicable to any tax imposed by a prior Act of Congress.

Regulations 77: Article 391.

Corporation returns.—Every corporation not expressly exempt from tax must make a return of income, regardless of the amount of its net income. In the case of ordinary corporations, the return shall be on Form 1120. . . .

Article 741.

Fiduciary returns.—Every fiduciary, or at least one of joint fiduciaries, must make a return of income—

(b) For the estate or trust for which he acts if the net income of such estate or trust is \$1,000 or over, or if the gross income of the estate or trust is \$5,000 or over, regardless of the amount of the net income, or if any beneficiary of such estate or trust is a non-resident alien.

The return in case (a) shall be on Form 1040 or 1040 A. In case (b) a return is required on Form 1040 with respect to any taxable net income of the estate or trust computed in accordance with section 162 and a return on Form 1041 with respect to any income deducted under section 162 (b) or (c). If a portion of the income of the estate or trust is retained by the fiduciary and the remainder is distributable or distributed to beneficiaries, both Forms 1040 and 1041 will be required. (See article 862.) . . .

VENUE

Revenue Act of 1934, c. 277, 48 Stat. 760:

Sec. 519. VENUE FOR APPEALS FROM BOARD OF TAX APPEALS.

(a) Section 1002 of the Revenue Act of 1926 is amended to read as follows:

SEC. 1002. (a) Except as provided in subdivision (b), such decision may be reviewed by the Circuit Court of

Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia.

“(b) Notwithstanding the provisions of subsection (a), such decision may be reviewed by any Circuit Court of Appeals or the Court of Appeals of the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.”

(c) Section 1002 of the Revenue Act of 1926, as amended by this section, shall be applicable to all decisions of the Board rendered on or after the date of the enactment of this Act, and such section, as in force prior to its amendment by this section, shall be applicable to such decisions rendered prior thereto, except that subdivision (b) thereof may be applied to any such decision rendered prior thereto (U. S. C. Title 26, Sec. 641).

OCT 26 1939

CHARLES S. HARRIS

No. 462

In the Supreme Court of the United States

OCTOBER TERM, 1939

✓ **GERMANTOWN TRUST COMPANY, TRUSTEE OF THE
GERMANTOWN TRUST COMPANY BOND INVESTMENT
FUND, PETITIONER**

v.

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT**

MEMORANDUM FOR THE RESPONDENT

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(1)

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MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 48-53) is reported in 106 F. (2d) 139. The unpublished memorandum opinion of the Board of Tax Appeals, entered August 24, 1938, is printed in the record at pages 16-17.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 14, 1939 (R. 52-53). The petition for a writ of certiorari was filed October 13, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in taking jurisdiction of the petition to review the decision of the Board of Tax Appeals.

2. Whether the assessment and collection of the proposed deficiency in tax are barred by the statute of limitations. The answer to this question depends upon whether, under the facts, the period for assessment is governed by the provisions of Section 275 (a) of the Revenue Act of 1932 or by Section 275 (c) of that Act.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are printed in the Appendix, *infra*, pp. 10-12.

STATEMENT

This proceeding involves federal income taxes for the calendar year 1932 for which the Commissioner of Internal Revenue determined a deficiency in the sum of \$3,686. The facts were stipulated before the Board of Tax Appeals (R. 29-43), and the stipulation was adopted by the Board of Tax Appeals as its findings of fact (R. 16).

The Germantown Trust Company is a trust company organized and existing under the laws of the State of Pennsylvania, with its principal office in Philadelphia. Pursuant to authorization contained in its charter and in provisions of the laws of the State of Pennsylvania the company conducts a large trust business involving the handling of all forms of trust estates, and also acts as agent for various individuals and corporations in the custody, handling, and management of their investments. (R. 29.)

In order to afford persons of small means the advantage of investing funds in diversified high grade bonds without delay and undue expense and under conditions which would permit ready liquidation of their investment, the Germantown Trust Company, by agreement dated April 1, 1930, formed the Germantown Trust Company Bond Investment Fund, of which the Germantown Trust Company was designated trustee under the terms of the agreement. At all times material to this proceeding the Germantown Trust Company has acted as such trustee under the terms of that agreement.¹ (R. 29-30.)

On March 15, 1933, the Germantown Trust Company, as trustee under the agreement of April 1, 1930, filed a so-called "Fiduciary Return of In-

¹ A copy of the agreement of April 1, 1930, the provisions of which are not material to the questions raised by this appeal, is attached as Exhibit A to the stipulation of facts filed with the Board of Tax Appeals (R. 36-43).

come" on Treasury Form 1041 for the Germantown Trust Company Bond Investment Fund for the calendar year 1932 with the Collector of Internal Revenue for the First Collection District of Pennsylvania² (R. 35). The Germantown Trust Company, as such trustee, has never filed a Corporation Income Tax Return on Treasury Form 1120 for the Germantown Trust Company Bond Investment Fund for the year 1932 (R. 35).

The Fiduciary Return of Income on Form 1041 filed for the year 1932 by the Germantown Trust Company, as trustee, disclosed gross income of \$29,309.09 for the year 1932, consisting of interest on bank deposits, notes, bonds, etc., and deductions totaling \$2,738.51 (R. 35, 53A-53B).

On September 17, 1936, the Commisisoner of Internal Revenue prepared a so-called "Substitute Return" on Form 1120 (Corporation Income Tax Return) for the Germantown Trust Company, as trustee, under the agreement of April 1, 1930³ (R. 35).

The individual participants in the fund held by the Germantown Trust Company as trustee under

² A photostatic copy of the Fiduciary Return of Income, Form 1041, filed by the Germantown Trust Company for the year 1932 was attached as Exhibit D to the stipulation filed with the Board of Tax Appeals (R. 35), and is included in the record before this Court at pages 53A-53B.

³ A photostatic copy of the "Substitute Return" prepared by the Commissioner on Form 1120 for the year 1932 was attached to the stipulation of facts as Exhibit E (R. 35), and is included in the printed record before this Court at page 53C.

the agreement of April 1, 1930, who were required to make federal income tax returns for the year 1932, included in their respective returns the shares of the income as disclosed by a schedule attached to the Fiduciary Return of Income filed by the Germantown Trust Company. The last date on which any participant in this fund filed his return was, for the purpose of this proceeding, March 15, 1933. (R. 35-36.)

On or about July 8, 1936, an Internal Revenue agent recommended that the Germantown Trust Company Bond Investment Fund be taxed as a corporation as defined by Section 1111(2) of the Revenue Act of 1932 and Article 1312 of Treasury Regulations 77 (R. 36).

On February 27, 1937, the Commissioner of Internal Revenue mailed a notice of deficiency to the Germantown Trust Company Bond Investment Fund, Germantown Trust Company, Trustee, stating, among other things, that during the year 1932 it was operating as a corporation as defined by Section 1111(2) and Article 1312, Regulations 77, Revenue Act of 1932 (R. 8-11, 36). An appeal from this notice was taken to the Board of Tax Appeals by a petition filed on May 22, 1937 (R. 4-7). The only questions raised by that petition were: (1) Whether the Germantown Trust Company Bond Investment Fund was taxable for the year 1932 as a corporation or as a trust; and (2): whether assessment and collection of the deficiency were barred by the statute of limitations at the time

the deficiency notice was mailed (R. 4-5, 16). Without passing upon the question whether the Fund was taxable as a corporation or as a trust, the Board held that the assessment of the deficiency was barred by the provisions of Section 275 (a) of the Revenue Act of 1932 prior to the date the deficiency notice was mailed (R. 16-17).

The Commissioner appealed to the Circuit Court of Appeals for the Third Circuit, where the additional question was raised, whether that court had power to review the decision of the Board. The authority of the court rested upon Section 1002 (a) of the Revenue Act of 1926, as amended by Section 519 (a) of the Revenue Act of 1934 which permitted review by that "Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia."

The Circuit Court of Appeals held that the information return filed by the taxpayer was sufficient to give it jurisdiction to review the order of the Board, but that such "return" was not a "return of the tax imposed by this title" within the meaning of Section 275 (c) of the 1932 Act and that the proposed assessment was therefore timely. It accordingly reversed the decision of the Board.

DISCUSSION

I

We do not oppose the granting of the writ on the question of the power of the Circuit Court of Appeals to review the judgment of the Board. Its decision in this regard is in conflict with *Commissioner v. Roosevelt & Son Inv. Fund*, 89 F. (2d) 706 (C. C. A. 2d). An authoritative ruling by this Court on this question will be helpful in clearing up the confusion that has arisen subsequent to the *Roosevelt & Son Inv. Fund* case.⁴

II

However, we oppose the granting of the writ on the question of the period of limitations and the applicability of Section 275 (c). On this point there is no conflict of authority. And although it involves the interpretation of language similar to that involved in the jurisdictional question, that language nevertheless has an entirely different legislative background and was properly construed by the court below. Section 275 (c) of the Act provides that where a corporation makes no return of

⁴ Thus, in order to protect itself in this very case, the Government was compelled to take two appeals, one to the Circuit Court of Appeals for the Third Circuit and one to the Court of Appeals for the District of Columbia. The latter is still pending, awaiting the final outcome of this appeal.

the income tax imposed by Title I of the Act, and where each of the shareholders includes in his individual return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed. The reports of the Committee on Ways and Means of the House (H. Rep. No. 1, 69th Cong., 1st Sess., p. 11.) and of the Committee on Finance of the Senate (S. Rep. No. 52, 69th Cong., 1st Sess., p. 28), clearly demonstrate that the limitation provision in question, which was first enacted as Section 277 (a) (5) of the Revenue Act of 1926 (c. 27, 44 Stat. 9), was intended to cover a special class of cases of which this is one. The respective committee reports explain that the provision in question, which has been reenacted without change as Section 275 (c) of subsequent Revenue Acts—

is incorporated in the bill to make certain that if in the future the beneficiaries of a trust or the members of an association include their distributive share in their income-tax return, and if at a later date it should be held that the trust or association is subject to the corporation tax and should have made the return, the statute of limitations as applied to the trust or association shall run from the dates above specified.

It is thus plain that the Circuit Court of Appeals was justified in holding that the four-year period of limitations in Section 275 (c) was applicable rather

than the two-year period in Section 275 (a), and it is equally apparent that any superficial resemblance between this issue and the jurisdictional question is without substance.

CONCLUSION

We do not oppose the petition, but urge that the writ be limited to the question of the jurisdiction of the Circuit Court of Appeals.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
ARNOLD RAUM,
F. E. YOUNGMAN,

Special Assistants to the Attorney General.

OCTOBER, 1939.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement. [U. S. C., Title 26, Sec. 641.]

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this title shall be

assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(b) *Request for Prompt Assessment.*—In the case of income received during the lifetime of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within one year after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of two years after the return was filed. This subsection shall not apply in the case of a corporation unless—

(1) Such written request notifies the Commissioner that the corporation contemplates dissolution at or before the expiration of such year; and

(2) The dissolution is in good faith and begun before the expiration of such year; and

(3) The dissolution is completed.

(c) *Corporation and Shareholder.*—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed.

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 519. VENUE FOR APPEALS FROM BOARD OF TAX APPEALS.

(a) Section 1002 of the Revenue Act of 1926 is amended to read as follows:

"VENUE

"Sec. 1002. (a) Except as provided in subdivision (b), such decision may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia.

"(b) Notwithstanding the provisions of subsection (a), such decision may be reviewed by any Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

(b) Section 1002 of the Revenue Act of 1926, as amended by this section, shall be applicable to all decisions of the Board rendered on or after the date of the enactment of this Act, and such section, as in force prior to its amendment by this section, shall be applicable to such decisions rendered prior thereto, except that subdivision (b) thereof may be applied to any such decision rendered prior thereto. [U. S. C., Title 26, Sec. 641.]

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No. 462

In the Supreme Court of the United States

OCTOBER TERM, 1939

**GERMANTOWN TRUST COMPANY, TRUSTEE OF THE
GERMANTOWN TRUST COMPANY BOND INVEST-
MENT FUND, PETITIONER**

v.

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT**

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 48-52) is reported at 106 F. (2d) 139. The unpublished memorandum opinion of the United States Board of Tax Appeals is printed in the record at pages 16-17.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 52-53) was entered July 14, 1939. The petition for a writ of certiorari was filed October 13,

1939, and was granted November 13, 1939. (R. 54.) The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below had authority to review the decision of the United States Board of Tax Appeals.

2. Whether the assessment of the tax involved in this proceeding was barred by the statute of limitations at the time the deficiency notice was issued.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are printed in Appendix A, *infra*, pp. 32-35.

STATEMENT

This proceeding involves a deficiency in income tax asserted by the Commissioner of Internal Revenue against the Germantown Trust Company Bond Investment Fund for the year 1932. The facts were stipulated before the Board of Tax Appeals (R. 29-43), and the stipulation was adopted by the Board as its findings of fact (R. 16).

The Germantown Trust Company is a trust company organized and existing under the laws of the State of Pennsylvania, with its principal office in Philadelphia. It conducts a large trust business involving the handling of all forms of trust estates, and also acts as agent for various individuals and

corporations in the custody, handling and management of their investments. In order to afford persons of small means the advantage of investing funds in diversified high grade bonds without delay and undue expense and under conditions which would permit ready liquidation of the investment, the Germantown Trust Company, by agreement dated April 1, 1930, formed the Germantown Trust Company Bond Investment Fund, the Trust Company being designated trustee under the terms of the agreement. At all times material to this proceeding the Trust Company has acted as such trustee under the terms of that agreement.¹ (R. 29-30.)

The tax period here in question is the calendar year 1932, but the petitioner has never filed a *return of tax* for that year on Treasury Form 1120 (which is required for corporate income tax returns) on behalf of the Germantown Trust Company Bond Investment Fund. However, it did file for that period with the Collector of Internal Revenue for the First Collection District of Pennsylvania, an *information* return on behalf of the Fund, a so-called "Fiduciary Return of Income" on Treasury Form 1041 (R. 35, 53A-B). The information return disclosed gross income of \$29,309.09 for the year 1932, consisting of interest on

¹ A copy of the agreement of April 1, 1930, the provisions of which are not material to the questions raised by this appeal, is attached as Exhibit A to the stipulation of facts filed with the Board of Tax Appeals. (R. 36-43.)

bank deposits, notes, bonds, etc., and deductions totaling \$2,738.51. (R. 35, 53A.)

On September 17, 1936, the Commissioner of Internal Revenue prepared a so-called "Substitute Return" on Form 1120 (Corporation Income Tax Return) for the Germantown Trust Company Bond Investment Fund (R. 35, 53C).

The individual participants in the Fund who were required to make federal income tax returns for the year 1932 for the amounts of the income of the Fund distributed or distributable to them, included in their respective returns their share of the income as disclosed by a schedule attached to the information return filed by the Germantown Trust Company. The last date on which any participant in this fund filed his return was, for the purpose of this proceeding, March 15, 1933. (R. 35-36.)

On or about July 8, 1936, an internal revenue agent recommended that the Germantown Trust Company Bond Investment Fund be taxed as a corporation as defined by Section 1111 (2) of the Revenue Act of 1932 and Article 1312 of Treasury Regulations 77. (R. 36.)

On February 27, 1937, the Commissioner of Internal Revenue mailed a notice of deficiency to the Germantown Trust Company Bond Investment Fund, Germantown Trust Company, Trustee, stating, among other things, that during the year 1932 it was operating as a corporation as defined by

Section 1111 (2) and Article 1312, Regulations 77, Revenue Act of 1932. (R. 8-11, 36.) An appeal from this notice was taken to the Board of Tax Appeals by a petition filed on May 22, 1937. (R. 4-7.) The only questions raised by that petition were: (1) whether the Germantown Trust Company Bond Investment Fund was taxable for the year 1932 as a corporation; and (2) whether assessment and collection of the deficiency were barred at the time the deficiency notice was mailed. (R. 4-5, 16.)

Without passing upon the question whether the Fund was taxable as a corporation, the Board held that assessment of the deficiency was barred by the provisions of Section 275 (a) of the Revenue Act of 1932 prior to the date the deficiency notice was mailed. (R. 16-17.)

The Commissioner appealed to the Circuit Court of Appeals for the Third Circuit, where the additional question was raised, whether that court had power to review the decision of the Board. The jurisdiction of that court was invoked under Section 1002 (a) of the Revenue Act of 1926, as amended by Section 519 (a) of the Revenue Act of 1934, which permitted review by that "Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia."

The Circuit Court of Appeals held that the information return filed by the taxpayer was sufficient to give it authority to review the order of the Board, but that such "return" was not a "return of the tax imposed by this title" within the meaning of Section 275 (c) of the 1932 Act and that the proposed assessment was therefore timely. It accordingly reversed the decision of the Board.

SUMMARY OF ARGUMENT

I

The Circuit Court of Appeals for the Third Circuit had authority to review the decision of the Board. Appellate review in Board cases is given exclusively to the several circuit courts of appeals and the Court of Appeals for the District of Columbia. And under Section 1002 of the Revenue Act of 1926, as amended by Section 519 of the Revenue Act of 1934, venue is laid in the circuit in which is located the office of the collector to which was made the return of tax in respect of which the liability in controversy arises.

It is our position that the Third Circuit was the appropriate place in which to seek review of the Board's decision, because petitioner had filed its fiduciary return in Philadelphia. Although that return was merely an information return rather than a return of the tax, it was nevertheless sufficient to identify petitioner geographically with the Third Circuit. And since the venue provisions

here involved are merely a convenient device for distributing appellate review among the intermediate federal courts so as to produce the minimum amount of hardship on the taxpayer, it seems clear that the word "return" should be interpreted so as to permit review in the circuit with which the taxpayer is geographically identified.

II

On the other hand, the fiduciary information return was not such a return of tax as would start the running of the statute of limitations against the Government. Section 275 (c) of the 1932 Act, upon which we rely, provides that where a corporation makes "no return of the tax imposed", but where each of the shareholders reports his distributive share, a deficiency may be assessed against the corporation "within four years after the last date on which any such stockholder's return was filed." And since "such last" date was March 15, 1933 in this case, the proposed assessment was timely because the deficiency notice was mailed on February 27, 1937.

Section 275 (c) was enacted to deal with precisely the kind of case as is here presented. The term "corporation" had long been defined in the revenue acts to include "associations"; but the application of the statute to particular situations had produced considerable litigation, and no satisfactory criteria had then been authoritatively out-

lined as a basis for solution of the problem. Accordingly, Congress thought that some trustees, mistakenly believing their trust to be a pure trust rather than an association, would not file any corporate return of tax, but would merely file a fiduciary information return, leaving it to the beneficiaries (or shareholders) to report their distributive share of the income for taxation.

When viewed against the background of its legislative history, it seems plain that Section 275 (c) is applicable here, and that the information return was not a "return of the tax imposed" within the meaning of these provisions. Although the information return was a sufficient return to identify the taxpayer geographically with the Third Circuit for the purpose of appellate venue, it certainly was not a "return of the tax imposed" for the purpose of the limitations provisions, which have a wholly different legislative history. Indeed, far from being a "return of the tax imposed", it was a disclaimer of liability and in effect advised the Commissioner to look elsewhere for the taxes.

Section 275 (a), upon which petitioner relies, is not applicable here. It deals with the general case and provides that in the ordinary situation the tax must be assessed within two years after the return was filed. But those general provisions are limited by the specific provisions of Section 275 (c) which are directed at just such a situation as is presented here.

ARGUMENT

I

THE COURT BELOW PROPERLY EXERCISED ITS POWER TO
REVIEW THE DECISION OF THE BOARD OF TAX APPEALS

1. Whether the Circuit Court of Appeals properly exercised its authority to hear this case is, strictly speaking, a question of venue rather than of jurisdiction. Pursuant to Section 1001 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, a decision of the Board of Tax Appeals may be reviewed by the Circuit Courts of Appeals and the Court of Appeals for the District of Columbia.² And, by Section 1003 those courts are given exclusive jurisdiction to review such decisions. Cf. *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716. The question in the case at bar is whether the venue properly lay in the Circuit Court of Appeals for the Third Circuit.

Section 1002 of the 1926 Act is entitled "Venue," and, as amended by Section 519 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680, 760, provides as follows:

VENUE

SEC. 1002. (a) Except as provided in subdivision (b), such decision may be reviewed by the Circuit Court of Appeals for the cir-

² This section was amended by Section 1101 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, to require that the petition for review be filed within three months after the Board's decision is rendered.

cuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia.

(b) Notwithstanding the provisions of subsection (a), such decision may be reviewed by any Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

In the instant case no stipulation was entered into between the Commissioner and the taxpayer, as permitted by subsection (b), so that the sole question is whether the information return filed with the Pennsylvania collector was a "return of the tax in respect of which the liability arises" within the meaning of subsection (a). If it was such a return, then review was properly sought in the Third Circuit, which embraces Pennsylvania. We believe that the court below correctly determined that it was authorized to entertain the appeal, and it was on account of the confusion produced by the contrary result in *Commissioner v. Roosevelt & Son Inv. Fund*, 89 F. (2d) 706 (C. C. A. 2d), that we did not oppose the taxpayer's petition for certiorari in the present case.³

³ Because of the uncertainty resulting from the *Roosevelt & Son Inv. Fund* decision, the Commissioner was compelled to file two petitions to review the Board's decision in the instant case in order to protect the Government's interests: one in the Circuit Court of Appeals for the Third Circuit,

2. In authorizing appeals to that circuit court of appeals for the circuit in which the return was filed, Congress was merely undertaking to distribute jurisdiction among the intermediate federal courts in such manner as would best serve the convenience of the taxpayer. Otherwise, serious hardship might result to a taxpayer, were he compelled to travel great distances beyond his circuit in order to litigate his claim. And it was for the purpose of accommodating the taxpayer that Congress placed venue in the circuit in which the return was filed.⁴

In short, the filing of the return was to be the consideration which identified the taxpayer with a particular geographical area. Where no return has been filed, the statute provides for review by the Court of Appeals for the District of Columbia, for in that situation there is absent the particular fact which makes one circuit more appropriate than another. And even under those conditions the parties may, pursuant to subsection (b), stipulate as to venue in some circuit court of appeals.

With the foregoing considerations in mind as the underlying basis for the allocation of appellate review among the intermediate federal courts, it is readily apparent that the petitioner has filed such

and the other in the Court of Appeals for the District of Columbia. —Consideration of the appeal to the latter court has been postponed by agreement of the parties until final determination of this proceeding.

⁴ Compare Section 1000 of the 1926 Act amending Title IX of the Revenue Act of 1924, c. 234, 43 Stat. 253, so as to provide in Section 907 (e) thereof that the Board shall hold hearings at points convenient to taxpayers.

a return as identifies it with the Third Circuit. That is the place that is most convenient to the taxpayer, and the circuit court of appeals located therein was undoubtedly the one that Congress intended should hear the appeal. Although the return was merely an information return it nevertheless served to fix petitioner geographically just as though it had been an ordinary corporate return. We respectfully submit that the return in this case was such a return as conferred power upon the court below to entertain the appeal. And any possible ambiguity in the language of Section 1002 (a) should be resolved in accord with the object which it sought to achieve. Cf. *Burnet v. Guggenheim*, 258 U. S. 280, 285; *Haggar Co. v. Helvering*, No. 176, present Term, decided January 2, 1940.

That the convenience of the taxpayer was the primary objective of these provisions is revealed by a survey of the events which led to their enactment. These provisions appeared in Section 519 (a) of the 1934 Act, and superseded the provisions first enacted in the 1926 Act. Under the 1926 Act it was originally provided in Section 1002 that in the case of an individual the decision should be reviewed "by the Circuit Court of Appeals for the circuit whereof he is an inhabitant", or if not an inhabitant of any circuit, then by the Court of Appeals for the District of Columbia; that in the case of a person other than an individual the decision should be reviewed "by the Circuit Court of Appeals for the circuit in which is located the office

of the collector to whom such person made the return", or, if no return was made, then by the Court of Appeals for the District of Columbia;⁵ that in the case of a corporation which had no principal place of business or principal office or agency in the United States the decision should be reviewed by the Court of Appeals of the District of Columbia; and that in the case of an agreement between the Commissioner and the taxpayer, "then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement".

Thus, an individual was identified geographically with the place in which he was an inhabitant, whereas an artificial person was identified with the place where it filed its return. Certain difficulties arose, however, in the application of those provisions. In the case of corporate taxpayers, the statute was narrowly construed to restrict the right to stipulate for review outside the circuit in which the return was made.⁶ Again, there was doubt as

⁵ The term "person" was defined by Section 2 (a) (1) of the Act as an individual, a trust or estate, a partnership, or a corporation. The term "corporation" was defined by paragraph (2) to include associations, joint-stock companies, and insurance companies. See *Ayer v. Commissioner*, 63 F. (2d) 231 (C. C. A. 2d), certiorari denied, 289 U. S. 752.

⁶ *Massachusetts Fire and Marine Ins. Co. v. Commissioner*, 42 F. (2d) 189 (C. C. A. 2d); *Nash-Breyer Motor Co. v. Commissioner*, 42 F. (2d) 192 (C. C. A. 2d), affirmed, 283 U. S. 483; *Grain King Mfg. Co. v. Commissioner*, 47 F. (2d) 608 (C. C. A. 2d); *Spring Canyon Coal Co. v. Commissioner*, 38 F. (2d) 764 (C. C. A. 8th).

to the appropriate court to which to take an appeal where an individual taxpayer had died after instituting a proceeding in the Board and the proceeding was continued by his personal representative who was an inhabitant of a different circuit. *Rusk v. Commissioner*, 53 F. (2d) 428 (C. C. A. 7th); *Matheson v. Commissioner*, 54 F. (2d) 537 (C. C. A. 2d); *Turner's Estate v. Helvering*, 68 F. (2d) 759 (App. D. C.); *Ayer v. Commissioner*, 63 F. (2d) 231 (C. C. A. 2d), certiorari denied, 289 U. S. 752. Troublesome litigation likewise arose over the proper appellate venue in cases involving the liability of a transferee of the taxpayer, where the taxpayer and his transferee resided in different circuits. *Burnet v. White Eagle Oil & Refining Co.*, 58 F. (2d) 141 (C. C. A. 8th); *La Salle Cement Co. v. Commissioner*, 59 F. (2d) 361 (C. C. A. 7th). And the doubts in those situations increased where there were several executors or several transferees, each of whom resided outside the circuit of the primary taxpayer as well as of each other.

Section 519 (a) of the 1934 Act was enacted, amending the original provisions in the 1926 Act to eliminate the difficulties occasioned by that earlier legislation. Under the amended statute review might be had in all cases, whether the taxpayer is an individual or artificial person, "by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return

of tax in respect of which the liability arises".⁷ These new provisions, however, were merely intended as more certain substitutes for their predecessors, and the dominant consideration continued to be the convenience of the taxpayer.

There is nothing in the legislative history of the amendatory provisions upon which to base a conclusion to the contrary. The provisions were proposed and adopted as an amendment while the bill was under consideration by the Senate. See the statement of Senator Harrison in presenting the amendment. 78 Cong. Rec., Part 6, p. 6325. See also Hearings before the Ways and Means Committee on Revenue Revision, 1934, pp. 196-197; Hearings before the Committee on Finance of the Senate on H. R. 7835, 73d Cong., pp. 67, 81-82. The conference committee accepted the Senate amendment with the explanation that it amended the law "so as to provide for review in the circuit in which is located the collector's office in which the return was filed, or by the Court of Appeals of the District of Columbia if no return was filed." H. Rep. No. 1385, 73d Cong., 2d Sess., p. 28, Appendix B, *infra*, p. 36. And the legislative history of Section 519 of the 1934 Act is devoid of any indication that the use of the words "return of the tax in respect of which the liability arises", instead of the word

⁷ These provisions have been incorporated in the Internal Revenue Code, as Section 1141 (b).

"return" as in Section 1002 (b) of the 1926 Act had any other purpose than to designate with certainty the court to which an appeal would lie in the case of transferees, executors, administrators, fiduciaries, and others who did not file the return which gave rise to the liability in controversy.

We submit that a construction of this statute which would give no recognition to a fiduciary return would defeat the deliberate purpose of Congress. It is clear that the statute is not dealing with a return which *discloses* the liability of transferees or executors or administrators, and there is accordingly no reason to suppose that it necessarily contemplates the disclosure of the liability of fiduciaries. Unlike a statute prescribing time limitations, this statute is satisfied if the liability of these classes of taxpayers arises "in respect of" the return which was filed.

II

ASSESSMENT OF THE PROPOSED DEFICIENCY IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

1. The tax year here involved is 1932, and the deficiency notice was mailed by the Commissioner on February 27, 1937. The question is whether the mailing was timely. The Government relies upon Section 275 (c) of the Revenue Act of 1932 which provides that where a "corporation makes no return of the tax imposed", but where each of the shareholders reports his distributive share

of the corporation's net income, then the corporation's tax may be assessed "within four years after the last date on which any such shareholder's return was filed". And such "last date" in this case was stipulated to be March 15, 1933 (R. 35-36). Accordingly, since the deficiency notice herein was mailed on February 27, 1937, within four years, it is clear that the mailing was timely, if Section 275 (e) is held to be applicable.

The taxpayer, on the other hand, relies upon Section 275 (a) of the 1932 Act which requires that the tax "shall be assessed within two years after the return was filed." And since petitioner filed its information return on March 15, 1933 (R. 35), it is apparent that the deficiency was not mailed within two years thereafter.

It is our position that the information return filed by petitioner in 1933 was not the kind of return that could start the running of the statute of limitations, and that Section 275 (e) rather than Section 275 (a) furnishes the applicable period of limitations.

2. We contend, as was held by the court below, that although the information return here involved was a "return" for the purpose of fixing venue in the Third Circuit within Section 1002, as amended, it was not such a "return" within Section 275 (a) and (e) as would start the running of the period of limitations. Congress was dealing with wholly

different matters in those sections, which should be interpreted in the light of what it was seeking to accomplish.

That the meaning of the word "return" is not exactly the same in the amended provisions of Section 1002, as in Section 275-is, of course, immaterial if it was used in a different manner. The content of a word changes with its context. *Towne v. Eisner*, 245 U. S. 418, 425. And it is clear that the same word may have a different meaning when used in different provisions of the same statute. See *Helvering v. Stockholms &c. Bank*, 293 U. S. 84, 86-88, and *Helvering v. British-American Tobacco Co.*, 69 F. (2d) 528 (C. C. A. 2d), affirmed, 293 U. S. 95, involving construction of the word "obligation" as used in different provisions of the same revenue act.*

Similarly, the words "tax imposed by this title" are used in Section 271 of the Revenue Acts of 1932

* For examples of cases construing particular words in tax statutes see *United States v. Ninety-nine Diamonds*, 139 Fed. 961, 966 (C. C. A. 8th), construing the word "false"; *Eliot Nat. Bank v. Gill*, 218 Fed. 600 (C. C. A. 1st), and *National Bank of Commerce v. Allen*, 223 Fed. 472 (C. C. A. 8th), construing the words "false and fraudulently"; *Gylesby Coal Co. v. Commissioner*, 46 F. (2d) 617 (C. C. A. 7th), construing the word "computed"; *Darby-Lynde Co. v. Alexander*, 51 F. (2d) 56 (C. C. A. 10th), construing "gross income"; *Ayer v. Commissioner*, 63 F. (2d) 231 (C. C. A. 2d), certiorari denied, 289 U. S. 752, construing "individual" and "persons other than an individual" as used in Section 1002 of the Revenue Act of 1926. See also *United States v. Fisk*, 3 Wall. 445.

and 1934 in contra-distinction to "amount shown as the tax by the taxpayer upon his return." In that context the words clearly mean the true and correct tax, but no one has suggested that the identical words in Section 275 (c) refer exclusively to a return which *correctly* calculates the amount of tax due.

In Section 1002, Congress was merely designating the particular intermediate federal court to which an appeal might be taken. An appeal was allowable in all cases, and it was simply necessary to devise some convenient formula for distributing appellate review among the various courts. The circuit in which the return was filed was selected as the basis for appellate venue because it was thought to be the most feasible place consistent with avoiding hardship to the taxpayer. An information return does not differ from a return of the tax itself for the purpose of identifying the taxpayer geographically with a particular circuit. And the word "return" as used in Section 1002, as amended, should therefore be construed to embrace an information return, in order to effectuate the purpose of the venue provisions.⁹

⁹ Practical considerations alone require that the word "return" be construed differently in the venue provisions, for any other conclusion would lead to a curious and absurd result here. The applicable limitations statute (Sec. 275 (a), Sec. 275 (c), or Sec. 276) always depends upon the final determination of the question whether the trust is taxable as an association.¹⁰ In this case there is the additional ques-

Section 275, on the other hand, is directed at a very different problem. Unlike a statute determining venue, the provision here involved deals with an event which is designed to put the Commissioner on notice that the tax liability is fixed unless he acts within a given time. Thus, while we think the venue statute is satisfied by a return which discloses the existence of any taxpayer (whether or not it be the transferee, executor, or fiduciary ultimately held liable), we believe that the limitations statute contemplates a return which puts the Commissioner on notice that he is dealing with a taxpaying entity. Section 275 (c) specifically refers, not merely to a return, but to "the return of the tax imposed by this title." And the requirement that there be a "return of the tax" is one that must be faithfully complied with to start the running of the period of limitations.

Thus, in *Lucas v. Pilliod Lumber Co.*, 281 U. S. 245, it was held that even a formal return of the tax which contained all the necessary information was not a sufficient compliance with the statute where it lacked the signatures of the officers of the

tion whether the filing of the fiduciary return prevents the application of Section 275 (c). These questions remain open until it is determined upon the merits whether the taxpayer is an association.

The question of venue, however, cannot remain at large until the merits are decided. The petitioner must have a sure and certain test in order to enable him to determine the court which is to review the decision of the Board.

corporate taxpayer. See also *Commissioner v. Krug*, 78 F. (2d) 57, 59 (C. C. A. 9th). In the instant case the information return filed by petitioner constituted an even wider departure from the statutory requirement. Far from being a return of the tax imposed upon petitioner, the information return consisted of a disclaimer of tax liability. In effect, the information return stated that a certain amount of net income had been received but that the beneficiaries were the taxpayers upon whom liability was imposed by the statute. Not only was it not a "return" within the strict sense, but it certainly was not a "return of the tax" within Section 275 (c). And since it was not a "return of the tax" under Section 275 (c), the Commissioner's deficiency notice, which was mailed within the four-year period specified therein, was therefore timely. It remains, therefore, but to consider whether Section 275 (c) is otherwise applicable.

3. There are only three provisions in the 1932 Act that have any possible bearing upon the period of limitations here. The first is Section 275 (a). It is captioned "General Rule", and requires that the assessment must be made "within two years after the return was filed."

The second provision is contained in Section 276 (a) which declares that the tax may be assessed at any time in the case of a false return or "of a failure to file a return".

The third provision is found in Section 275 (c), which provides as follows:

(c) *Corporation and shareholder.*—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed.

It is our contention that if petitioner is liable for taxes at all, then Section 275 (c) supplies the applicable period of limitations. Sections 275 (a) and 276 (a) merely deal with the general rule, which, we submit, is limited by the more specific provisions in Section 275 (c) directed at the very situation here before the Court.

Subsection (c) first appeared in the law as Section 277 (a) (5) of the Revenue Act of 1926. The reasons which led to its enactment are not far to seek.

The term "corporation" had been defined in the various revenue acts to include "associations".

¹⁰ Section 1 of the Revenue Acts of 1918, c. 18, 40 Stat. 1057; 1921, c. 136, 42 Stat. 227; 1924, c. 234, 43 Stat. 253; and 1926. Thereafter, the same definition appeared in Section 701 of the 1928 Act; Section 1111 of the 1932 Act; Section 801 of the 1934 Act; Section 501 of the 1935 Act, c. 829, 49 Stat. 1014; Section 1001 of the 1936 Act; and Section 901 of the 1938 Act, c. 289, 52 Stat. 447.

which expanded the meaning of "corporation." However, the precise meaning of "association" gave rise to considerable speculation, and there was much dispute as to when the trustees and beneficiaries of a trust could be treated as members of an association within the meaning of the revenue acts. Although there had been many lower court decisions on the question, and, indeed, several decisions of this Court,¹¹ the guiding principles had not been satisfactorily and authoritatively outlined until late in 1935 when this Court decided *Morrissey v. Commissioner*, 296 U. S. 344; *Swanson v. Commissioner*, 296 U. S. 362; *Helvering v. Combs*, 296 U. S. 365; and *Helvering v. Coleman-Gilbert*, 296 U. S. 369.¹²

¹¹ *Crocker v. Malley*, 249 U. S. 223; *Hecht v. Malley*, 265 U. S. 144.

¹² Indeed, in view of the illusive character of the inquiry, doubt has persisted even after the foregoing decisions as to their precise application to specific instances. And the litigation on the merits in the instant case is so. a indication of the unwillingness of taxpayers to accept those principles as applied to particular facts.

Here the Board, at first, found it unnecessary to decide the merits, for it ruled against the Government on the limitations issue (R. 16-17). But upon remand from the Circuit Court of Appeals, the Board, in an opinion dated September 5, 1939, held petitioner to be an "association" in accordance with the Commissioner's determination. Its opinion in this regard is not part of the record herein, but is set forth as Appendix C, *infra*, p. 37. However, in view of the fact that this case is now pending before this Court, the order of the Board which was entered on September 8, 1939, pursuant to that opinion, has since been vacated in accordance with a joint motion of both parties.

In view of the existing uncertainty in 1926, it was apparent that many trustees and beneficiaries might mistakenly consider their trusts as pure trusts rather than as "associations". Accordingly, it was entirely natural to suppose that many such trustees would erroneously fail to file any corporate return of tax but would simply file a fiduciary information return, leaving it to the beneficiaries to report their distributive share for taxation. The provisions of Section 277 (a) (5) of the 1926 Act, the predecessor of Section 275 (c) of the 1932 Act here involved, were enacted to meet just such a situation.¹³ And any possible doubt as to their purpose is dispelled by the explanation of the House Ways and Means Committee which accompanied the original bill (H. Rep. No. 1, 69th Cong., 1st Sess., p. 11):

LIMITATION OF ASSESSMENTS

SECTION 277 (a) (4).¹⁴ This section provides that if a corporation makes no return of the tax imposed by this bill, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the

¹³ It is significant that like considerations led to the enactment of Section 704 of the Revenue Act of 1928 two years later. See S. Rep. No. 960, 70th Cong., 1st Sess., pp. 44-45; H. Rep. No. 1882, 70th Cong., 1st Sess., p. 24.

¹⁴ The House committee referred to this provision as Section 277 (a) (4), for it was so designated in the bill as reported.

last date on which any such shareholder's return was filed. This provision is limited to taxes imposed under this bill, and it is incorporated in the bill to make certain that if in the future the beneficiaries of a trust or the members of an association include their distributive share in their income-tax return, and if at a later date it should be held that the trust or association is subject to the corporation tax and should have made the return, the statute of limitations as applied to the trust or association shall run from the dates above specified.

The Senate Finance Committee repeated this explanation in its report. (S. Rep. No. 52, 69th Cong., 1st Sess., p. 28.)

It is clear that Congress was legislating for the express purpose of reaching a special class of cases to which the four-year statute should apply and that the class was intended to include cases presenting the question whether a trust should be taxed as an association. That purpose would be largely defeated by recognizing a fiduciary return as a "return of the tax imposed by this title", because it was then and is now the normal practice for fiduciaries to file information returns.

The fiduciary return filed by petitioner was simply an information return. It patently was not a "return of the tax imposed" within the plain language of Section 275 (c). And the deficiency notice, which was mailed within four years after

the last date on which the shareholders filed their returns, was therefore timely.

The fiduciary return does not initiate the limitation period for the beneficiaries, although their identity is disclosed by the return. The time for assessing each beneficiary runs from the time he files his individual return. In this situation it would be an incongruous result that the fiduciary return nevertheless does start the limitation period for the association, which the return does not identify as a taxpayer.

4. Various miscellaneous contentions are pressed by petitioner, which we believe to be unsound.

(a) Much is made of the fact that the period of limitations in Section 277 (a) (5) of the 1926 Act, as originally introduced in the House, did not allow a longer period for assessment of taxes against associations (Br. 14-15). But that circumstance cannot be of any real significance, for the pivotal consideration is that the bill, as finally enacted, did provide for a longer assessment period in the case of associations. And the very fact that there was a difference between the bill, as enacted, and as introduced, is itself significant. The change occurred either deliberately or by mistake. That it was not a mistake is confirmed by the fact that the longer period of limitations has persisted through repeated reenactments of the statute. The reason for allowing a greater period in the case of associations was probably founded upon the uncertainty

of the criteria which characterize an association, and, as stated by the court below (R. 51-52), it was natural that the Commissioner should be given a longer period for assessment at that time. For, as pointed out *supra*, p. 23, the clarifying decisions of this Court in the *Morrissey* and related cases did not appear until late in 1935.

(b) Again, petitioner argues, relying upon numerous decisions, that the fiduciary information return was a sufficient compliance with the statute to constitute a return of the tax (Br. 19-26). But the cases cited do not support the contention. None of them, except *Roosevelt & Son Investment Fund v. Commissioner*, 34 B. T. A. 38, involved the application of Section 275 (c) of the 1932 Act or the corresponding provisions of other revenue acts. And although the decision of the Board in the *Roosevelt* case supports the taxpayer, the clear import of the decision of the Circuit Court of Appeals (89 F. (2d) 706) is to the contrary. This has been recognized by the Board itself, and its later decisions are likewise to the contrary. See *Lee H. Marshall Heirs v. Commissioner*, 39 B. T. A. 101, 111-113. See also *United States v. National City Bank of New York*, 21 F. Supp. 791, 797-798 (S. D. N. Y.).

Taxpayer assumes that if Section 275 (c) were absent from the statute, or if in any event it were inapplicable through failure of the stockholders to file returns, the result would not be a "no return" case under Section 276 if a fiduciary return had

been filed. We believe that petitioner misconceives those provisions. It relies (Br. 19-21) upon cases under earlier statutes holding that inaccurate returns may nevertheless be treated as "returns" for the purpose of the limitations provisions, if they are in substantial compliance with the Act. But in most of those cases the returns, while inaccurate or incomplete, nevertheless advised the Commissioner that they were the returns of taxable entities to whom the Commissioner could look for the payment of whatever was shown to be due or found upon investigation to be due.¹⁵ Unlike those cases, the return filed here was a disclaimer of liability and advised the Commissioner that he should look elsewhere for the taxes. The return was the report of a fiduciary to the effect that while certain income had been realized by the trust it was not taxable in bulk to any entity, but was to be taxed in the hands of seventy-eight separate taxpayers. We do not believe it can be properly said that a return which is a disclaimer of liability is a "return" within the meaning of Section 276.

However, even if the fiduciary return might be held to be a "return" within the meaning of Section 276, it is clearly not "a return of the tax imposed by this title" within the meaning of Section 275(c). As we have already pointed out, the re-

¹⁵ Apparently this was not true in *Werbeltorsky v. Commissioner*, 8 B.T.A. 442, and similar cases cited by taxpayer (Br. 20), and to that extent we think they were wrongly decided.

turn was a disclaimer of tax liability, and in view of the legislative history showing that Congress had this precise situation in mind, the deliberate choice of the language "return of the tax imposed by this title" must indicate that Congress was making a distinction between returns by entities which acknowledged that they alone were liable for any tax found to be due and information returns which indicated that they were not filed by taxpayers.

Moreover, Section 275 (c) is unlike Section 275 (a) in that it is normally applicable to the *whole* tax liability. Section 275 (a) deals with the amount of taxes to be assessed by the Commissioner in a case where a return has been filed, and generally involves *additional* taxes to be assessed. For, the return operates as a self-assessment of the tax which it discloses, and the normal application of Section 275 (a) is to additional taxes revealed after the Commissioner's investigations.¹⁶ This difference in the applicability of Section 275 (c) emphasizes the importance of the words "return of the tax imposed by this title" and lends further support to our contention that the information return which was filed in this case disclosing no tax liability on the part of the trust is not a "return of the tax imposed by this title".

¹⁶ Similarly, Section 275 (b) deals with a situation where a return has been filed which operates as a self-assessment and the time allowed is for the purpose of enabling the Treasury Department to discover any *additional* liability and make an assessment to cover it.

A fiduciary return is unlike a return of the tax in that it directs the course of the Commissioner's inquiry into a channel which is inconsistent with treating the trust as an entity. In this respect it is like the claim for special assessment which this Court held inconsistent with a claim for regular assessment. *United States v. Henry Prentiss & Co.*, 288 U. S. 73, 86.

(c) Petitioner suggests (Br. 16) that the purpose of Section 275 (c) was not to allow a longer period of limitations in the case of associations, but rather to provide a period of limitations where the members of a group, believing themselves not to be an association, have included their distributive shares in their individual returns and have not filed any fiduciary or corporate return. The difficulty with that interpretation, however, is disclosed by the opinion below (R. 51). For it is normal practice for a fiduciary to file an information return. And without such a return the individuals who had received distributions would have no ready means of ascertaining whether the amounts which they had received corresponded with the "distributive share" which Section 275 (c) contemplates. Petitioner's suggestion (Br. 18) that such information would be readily available to small groups of beneficiaries of family trusts is no answer. The statute is not limited to such small groups, and the case at bar itself furnishes an example of relatively widespread membership extending far beyond the family circle.

(d) Finally, the contention (Br. 24) that the Government's construction produces the inequitable result of taxing the income to the association at a time when it is too late to permit the beneficiaries to recover excessive taxes paid by them on account of the distribution of the same income is unsound. Congress has remedied such situations by Section 820 of the Revenue Act of 1938, c. 289, 52 Stat. 447, which in effect permits equitable adjustments in such cases as this notwithstanding the bar of the statute of limitations.

CONCLUSION

The decision of the court below is correct, and should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Attorney General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
ARNOLD RAUM,
F. E. YOUNGMAN,

Special Assistants to the Attorney General.

FEBRUARY 1940.

APPENDIX A

Revenue Act of 1926, c. 27, 44 Stat. 9.

SEC. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement. [U. S. C., Title 26, sec. 641.]

The foregoing provisions were amended by Section 519 of the Revenue Act of 1934, c. 277, 48 Stat. 680, which provides as follows:

SEC. 519. VENUE FOR APPEALS FROM BOARD OF TAX APPEALS.

(a) Section 1002 of the Revenue Act of 1926 is amended to read as follows:

"VENUE

"SEC. 1002. (a) Except as provided in subdivision (b), such decision may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia.

"(b) Notwithstanding the provisions of subsection (a), such decision may be reviewed by any Circuit Court of Appeals, or the Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

(b) Section 1002 of the Revenue Act of 1926, as amended by this section, shall be applicable to all decisions of the Board rendered on or after the date of the enactment of this Act, and such section, as in force prior to its amendment by this section, shall be applicable to such decisions rendered prior thereto, except that subdivision (b) thereof may be applied to any such decision rendered prior thereto. [U. S. C., Title 26, Sec. 641.]

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1. APPLICATION OF TITLE.

The provisions of this title shall apply only to the taxable year 1932 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1932 shall not be affected by the provisions of this title; but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Title IX of this Act or by legislation enacted subsequent to this Act.

* * * * *

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

* * * *

SEC. 142. FIDUCIARY RETURNS.

(a) *Requirement of return.*—Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title.

* * * *

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General rule.*—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assess-

ment for the collection of such taxes shall be begun after the expiration of such period.

(b) *Request for prompt assessment.*—In the case of income received during the lifetime of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within one year after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of two years after the return was filed. This subsection shall not apply in the case of a corporation unless—

(1) Such written request notifies the Commissioner that the corporation contemplates dissolution at or before the expiration of such year; and

(2) The dissolution is in good faith begun before the expiration of such year; and

(3) The dissolution is completed.

(c) *Corporation and shareholder.*—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed.

SEC. 276. SAME—EXCEPTIONS.

(a) *False return or no return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

APPENDIX B

H. Rep. No. 1385, 73d Cong., 2d Sess., p. 28:

Amendment no. 150: Subsection (a) of this amendment amends the provisions of existing law which relate to venue of appeals from the Board of Tax Appeals to the Circuit Courts of Appeal or the Court of Appeals of the District of Columbia so as to provide for review in the circuit in which is located the collector's office in which the return was filed, or the Court of Appeals of the District of Columbia if no return was filed. It further specifically authorizes the Commissioner and the taxpayer to stipulate review by any Circuit Court of Appeals or to stipulate review by the Court of Appeals of the District.

The amendments explained above are applied to all decisions of the Board made on or after the date of the enactment of the act but not to those rendered before such time except that the provisions authorizing stipulation of court of review by the Commissioner and the taxpayer may be applied to decisions rendered prior to that time. The House recedes with an amendment changing the section number.

APPENDIX C

UNITED STATES BOARD OF TAX APPEALS

Germantown Trust Company Bond Investment Fund, Germantown Trust Company, Trustee, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket No. 89166.

Paul F. Myers, Esq., for the petitioner.

C. R. Marshall, Esq., for the respondent.

MEMORANDUM OPINION

MURDOCK. The Commissioner determined a deficiency of \$3,686 in the income tax of this petitioner for 1932. The only issue for decision is whether the petitioner is an association, within the meaning of that term as used in section 1111 (a) (2) of the Revenue Act of 1932, and, therefore, taxable as a corporation. The facts are found as stipulated by the parties.

The Germantown Trust Company, hereafter called the company, was organized under the laws of Pennsylvania and conducts a large trust and agency business involving the managing and investing of funds. It formed the "Fund" here in question on April 1, 1930. The purposes were to make substantially permanent conservative investments in corporate, federal, state, and municipal bonds and to afford persons of small means the

advantage of a diversified bond investment which would be inexpensive and could be quickly liquidated. Only persons for whom the company held securities as agent or trustee could and did participate. Such persons desiring to participate signed an assent to the agreement and deposited cash to be invested and reinvested. A certificate of participation was then issued in the name of the participant but was held by the company. The original shares were issued for a deposit of \$1,000 but thereafter for the current worth of the shares. The shares were not transferable but a participant could withdraw all or any of his shares on the first day of any quarter, and the company could issue new shares and take in new participants.

The company was named trustee. It received no compensation from the Fund but could charge the participants for its services as agent or trustee of their funds. The trustee was authorized to manage the common fund, to invest and reinvest, and otherwise control the fund as it thought best. The trust committee of the company managed the fund. Investments were confined to bonds although the trustee had authority to hold and buy and sell stocks also if necessary or advisable. The company kept all of the assets of the fund separate from all other property in its possession and kept separate accounts for the fund showing all transactions. It furnished a statement of investments upon request and it furnished an annual statement of income and principal. All capital gains, with certain exceptions, were treated as principal. Income was divided among the shares and credited quarterly. The trust could be amended or terminated by the company. The latter managed and conducted the

trust at all times in accordance with the agreement of April 1, 1930.

The participants had an undivided interest in the entire Fund. Changes in investments were made whenever they were necessary or deemed advisable. Although some securities were sold shortly after they were purchased, most were held for rather long periods. There were 57 participants owning 487 shares, each worth \$841.68, at the beginning of 1932 and 78 participants owning 595 shares, each worth \$889.02 at the end of the year. Five persons withdrew twenty-one units during the year and twenty-three new participants came in. The petitioner made twenty-nine sales of thirteen different bonds for \$144,500.90 at a loss of \$6,460.42 during the year and purchased twenty-six different bonds for \$246,615.07 in twenty-six transactions.

Although the differences between the two cases favor the present petitioner, nevertheless those differences are insufficient to distinguish this case from that of *Brooklyn Trust Co., Trustee*, 31 B. T. A. 1070, affd. 80 F (2) 865, cert. denied 298 U. S. 659. The facts in the two cases are similar in most respects. The principal differences are that the Brooklyn fund was much larger and had more participants, its investments were not limited to bonds but included stocks and mortgages, and its certificates were in smaller units and could be assigned, although only for cash to other customers of the company. The fund in the present case was large enough that the operation and management of it could constitute a business. Management of a fund invested entirely in bonds can be a business, just as managing one invested in bonds, stocks, and mortgages can be a business. The difference

in size of the units seems relatively unimportant. Although the certificates in one case could be transferred directly, while those in the other could not, nevertheless, a change in participants could be accomplished with about the same degree of ease in one case as in the other. The fund in each case was actively managed for safe investment in a changeable market to the best of the ability of the trustee. The purpose and the form of operation of the two were substantially identical.

The court, in the *Brooklyn Trust* case, cited the four cases decided by the Supreme Court on December 16, 1935, wherein it was pointed out that an ordinary trust is one where particular property is to be held upon specific trusts for the benefit of described persons, while a business trust is not to hold and conserve particular property but is to conduct a business and share its gains. The court also cited its prior decision in *Ittleson v. Anderson*, 67 F (2) 323, where it said that if an estate engages in considerable business activity by trading in securities it is conducting an investment business and is taxable as a corporation. It also cited *Investment Trust of Mutual Investment Co.*, 27 B. T. A. 1322, affd. 71 F (2) 1009. It then said of the *Brooklyn Trust* trustees:

• They were not, to apply the recently pronounced test of the Supreme Court, holding and preserving particular property, with incidental powers, but were conducting a live investment business and sharing its gains. * * *

The large investment here in the various types of securities required active management. To keep such a fund invested in securities to the best advantage was to engage in business in the fullest sense.

Upon authority of the above case and the cases cited therein by the Board and the court, we hold that the present trust was an association taxable as a corporation under the Revenue Act of 1932. See also *Schroeder Employees Thrift Club*, 36 B. T. A. 645.

Decision will be entered for the respondent.

Entered: September 5, 1939.

SUPREME COURT OF THE UNITED STATES.

No. 462.—OCTOBER TERM, 1939.

Germantown Trust Company, Trustee
of the Germantown Trust Company
Bond Investment Fund, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Third Circuit.

[February 26, 1940.]

Mr. Justice ROBERTS delivered the opinion of the Court.

This case involves the construction and application of provisions of the Revenue Act of 1926, as amended by that of 1934, and of the Revenue Act of 1932, relating to the venue of proceedings to review a decision of the Board of Tax Appeals and setting limitations upon the assessment of income tax.

The petitioner is a trust company, doing a general business as such, including administering trust estates and acting as agent for the custody, handling, and management of its clients' investments. In 1930 it created, by an appropriate instrument, a fund to afford those for whom it acted the advantage of investing small amounts in securities at minimum expense and with opportunity of ready liquidation. The fund has since been managed according to the terms of the agreement. In the course of administration the petitioner has paid to the participants their respective shares of income from the invested principal, and has filed fiduciary returns of income on Treasury Form 1041, intended for use by trustees.

March 15, 1933, the petitioner, as trustee, filed such a return for the calendar year 1932, with the Collector of Internal Revenue for the First District of Pennsylvania, at Philadelphia. The return accurately set forth the gross income, the deductions, and the net income,—in short all information necessary to the calculation of any tax which might be due,—and attached a list of the beneficiaries of the fund, and their shares of the income. No corporation income tax return was filed on Treasury Form 1120. The participants in

2. *Germantown Trust Co. vs. Commissioner of Internal Revenue.*

the fund, who were required to make individual returns for the year 1932, included in their respective returns, filed on or before March 15, 1933, their shares of income.

September 17, 1936, pursuant to the recommendation of a treasury agent that the fund be taxed as a corporation,¹ the respondent prepared from the Form 1041 return, a substitute corporation return on Form 1120, covering the year 1932, and, on February 27, 1937, gave notice of a consequent deficiency of tax.

The petitioner carried the matter to the Board of Tax Appeals for redetermination, asserting that it was taxable as a trust and not as an association and that assessment and collection of the asserted deficiency was barred by the expiration of two years from the date its return was filed. The Board held the assessment barred.

The respondent petitioned the United States Court of Appeals for the Third Circuit to review the Board's decision. That court held that the venue provision of Section 1002(a) of the Revenue Act of 1926, as amended by Section 519 of the Revenue Act of 1934,² empowered it to entertain the petition, and that the assessment of a deficiency was not barred by Sections 275 and 276 of the Revenue Act of 1932,³ the applicable section, in its view, being 275(e).⁴

¹ § 1111(a) (2) of the Revenue Act of 1932, 47 Stat. 169, 289: "The term 'corporation' includes associations". See *Morrissey v. Commissioner*, 296 U. S. 344.

² Sec. 1002.(a) Except as provided in subdivision (b) [relating to venue by stipulation], such decision may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia. (Italics supplied.) 44 Stat. 9, 110; 48 Stat. 680, 760; 26 U. S. C. 641(b).

³ Sec. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(c) *Corporation and Shareholder.*—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed. (Italics supplied.)

Sec. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. Revenue Act of 1932, 47 Stat. 169, 237.

⁴ *Commissioner v. Germantown Trust Co., Trustee*, 196 F. (2d) 139.

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The petitioner sought certiorari on the ground that the Circuit Court of Appeals' decision that the fiduciary return it had filed was a return which governed venue under Section 1002, as amended, but no return within the meaning of Section 275(c), conflicts with a decision of the Circuit Court of Appeals for the Second Circuit.⁵ Because of the conflict we granted certiorari.

Petitioner and respondent agree that the court below was right in holding the return in question was such a return as fixed the venue of the petition for review in the Third Circuit, where the return was filed. We concur in this view.

The petitioner contends that the fiduciary return filed on Form 1041 was a return within the meaning of Section 275(a), which limits the time for assessment to two years after the filing of the return. The respondent insists that the return was "no return of the tax" within the meaning of Section 275(c), and, therefore, the four-year limitation specified in that section applies.

As the notice of deficiency was given more than two years after the filing of the fiduciary return and within four years of the filing of the last return by any participant in the fund, decision turns upon which subsection governs.

We hold that the return was a return within the meaning of Section 275(a) and that the petitioner cannot be held to have made no return so as to bring the case within Section 275(c).

First. We are of opinion that if the return filed by the petitioner was such as to create venue of the proceeding for review in the court below, it was also a return under the terms of Section 275(a), so that the two-year period of limitations imposed by that section is applicable.

The return was a fiduciary return. It is admitted that the petitioner in respect of the fund was a fiduciary and was bound to file such a return.⁶ It contained all of the data from which a tax could be computed and assessed although it did not purport to state any amount due as tax. Section 1002(a), as amended, *supra*, confers venue upon the Circuit Court for the circuit in which was made "the return of the tax in respect of which the liability arises." Section 275(a) provides that the amount of tax must be assessed

⁵ *Commissioner v. Roosevelt & Son Inv. Fund*, 89 F. (2d) 706.

⁶ *Revenue Act of 1932*, 47 Stat. 169, 214.

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within two years after "the return was filed." Section 275(c) fixes a period of four years for assessment "if a corporation ~~makes no~~ return of the tax imposed by this title", but each shareholder returns his distributive share of the net income.

We think the language of the sections is such that it cannot be said the fiduciary return filed by the petitioner was a return of the tax in respect of which the liability arises but was no return of the tax imposed by the statute.

The respondent urges that the two sections have separate aims; that the venue provision was inserted for the convenience of taxpayers, so that they should not be compelled to litigate in courts far from their domicile, whereas the limitation sections have nothing to do with the designation of a forum. Conceding that this is true, it remains that, if the return in question complies with the one description, it equally complies with the other. We find no adequate reason for attributing a different meaning to the two phrases.

Second. Section 275(c) is inapplicable. Sections 275 and 276 set up a complete scheme of limitations on assessment of income taxes. Section 275(a) imposes a limitation of two years after the filing of the return. Section 276(a) provides that there shall be no period of limitations if a false return, or no return, be filed. If the statute went no further, and if the respondent's position is correct that, in this case, the taxpayer was a corporation and filed no return as such, then there would be no period of limitations whatever. This was the situation under the Revenue Act of 1924.⁷

The legislative history demonstrates that Section 275(c) was adopted to set a period of limitations where no return is filed by the association but returns are filed only by the members. In other words, subsection (c) was adopted to limit, rather than to enlarge, the time for assessment in such a case.⁸

The respondent's contention is that where a fiduciary, in good faith, makes what it deems the appropriate return, which discloses all of the data from which the tax, treated as one imposed upon an

⁷ Revenue Act of 1924, Secs. 275(a)(1) and 278(a); 43 Stat. 253, 299.

⁸ The provision was first inserted as Sec. 277(a)(5) of the Revenue Act of 1926, 44 Stat. 9, 58. The Committee Reports on the section, construed in connection with the course of the bill in Congress, sustain, rather than negative, the view that the section was intended to impose a period of limitation where one had not theretofore existed. See H. Rep. No. 1, 69th Cong., 1st Sess., p. 11; S. Rep. No. 52, 69th Cong., 1st Sess., p. 28. Compare Hearings, Committee on Ways and Means of the House, 73rd Cong., 1st Sess., p. 146.

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association (classified as a corporation under the statute), can be computed, such a return is to be deemed no return. We think this view inadmissible.

It cannot be said that the petitioner, whether treated as a corporation or not, made no return of the tax imposed by the statute. Its return may have been incomplete in that it failed to compute a tax, but this defect falls short of rendering it no return whatever.⁹

The judgment is reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

⁹ *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 180; *Commissioner v. Statson Co.*, 43 F. (2d) 553; *United States v. Tillinghast*, 69 F. (2d) 718; *Mabel Elevator Co.*, 2 B. T. A. 517; *Abraham Werbelovsky*, 8 B. T. A. 442, 446; *F. M. Stearns*, 16 B. T. A. 889; *J. R. Brewer*, 17 B. T. A. 704.